Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1978

No. 78- 78-781

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, SUPERINTENDENT OF SCHOOLS, SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota and CHAIRPERSON, BOARD OF EDUCATION, SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota,

*Petitioners,*

vs.

JEANETTE BOOKER, by CURTIS C. CHIVERS, her Grandfather and guardian ad litem; DAVID G. HAGE, by GEORGE S. HAGE, his father and guardian ad litem; and MONTEZ WILLIS, by JAMES M. WILLIS, her father and guardian ad litem, on behalf of themselves and all others similarly situated,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## TABLE OF CONTENTS


Page

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

QUESTIONS PRESENTED ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 4

STATEMENT OF THE CASE ..... 4

1. Nature of the Case ..... 4
2. The District Court's Original Decision ..... 5
3. The Desegregation/Integration of the Minneapolis Public Schools ..... 6
4. The Decisions Below ..... 9

REASONS FOR GRANTING THE WRIT ..... 11

I. The Decisions Below Are in Conflict With, and Misapply, Decisions of this Court Holding that Desegregation Decrees Must Be Limited to the Elimination of the Incremental Segregative Effect of Constitutional Violations and Must Not Require Annual Adjustments of the Racial Composition of the Schools ..... 11

II. The Decisions Below Conflict with, and Misapply, Decisions of this Court Allowing Modification of Desegregation Decrees Where New Circumstances of Law or Fact Have Arisen ..... 20

III. The Decisions Below Erroneously Determined Important Constitutional and Federal Statutory Issues Regarding the Educaton of American Indian Children ..... 21

CONCLUSION ..... 23

## APPENDIX INDEX


United States Constitution, Fourteenth Amendment, §1 A-1

Indian Education Act, Pub.L. 92-318, Tit. IV, §411 (a), 86 Stat. 235, 334 (June 23, 1972), 20 U.S.C. §241aa (1976) ..... A-1

Indian Education Act, Pub.L. 92-318, Tit. IV, §411 (a), 86 Stat. 235, 334 (June 23, 1972), 20 U.S.C. §241cc (1976) ..... A-1

Indian Education Act, Pub.L. 92-318, Tit. IV, §411 (a), 86 Stat. 235, 334 (June 23, 1972), 20 U.S.C. §241dd (1976) ..... A-3

Indian Education Act, Pub.L. 92-318, Tit. IV, §421 (a), 86 Stat. 235, 339 (June 23, 1972), 20 U.S.C. §887c (1976) ..... A-6

Indian Self-Determination and Education Assistance Act, Pub.L. 93-638, §2, 88 Stat. 2203 (Jan. 4, 1975), 25 U.S.C. §450 (1976) ..... A-11

Indian Self-Determination and Education Assistance Act, Pub.L. 93-638, §3, 88 Stat. 2203 (Jan. 4, 1975), 25 U.S.C. §450a (1976) ..... A-13

Findings of Fact, Conclusions of Law and Order for Judgment of the United States District Court for the District of Minnesota, Entered May 24, 1972 (351 F.Supp. 799) ..... A-14

Memorandum Order of the United States District Court for the District of Minnesota, Entered May 22, 1978 (451 F.Supp. 659) ..... A-38

Memorandum Order of the United States District Court for the District of Minnesota, Entered June 23, 1978 ..... A-58

Portion of Transcript of Hearing Before United States Court of Appeals for the Eighth Circuit, Dated Sept. 15, 1978 ..... A-61

Opinion of the United States Court of Appeals for the Eighth Circuit, Filed Oct. 12, 1978 ..... A-62

Graph: Bancroft School's Actual and Hypothetical Minority Percentages (Appendix D-2, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-78

Graph: Mann School's Actual and Hypothetical Minority Percentages (Appendix D-3, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-79

Graph: Field School's Actual and Hypothetical Minority Percentages (Appendix D-4, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-80

Graph: Bethune School's Actual and Hypothetical Minority Percentages (Appendix D-5, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-81

Graph: Harrison School's Actual and Hypothetical Minority Percentages (Appendix D-6, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-82

Graph: Central High School's Actual and Hypothetical Minority Percentages (Appendix D-7, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-83

Graph: Minneapolis Public School's Sight Count Enrollment and Numbers of Minority Pupils (Appendix E-1, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-84

Graph: Minneapolis Public Schools' Percentages of Minority Pupils (Appendix E-2, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-85

Map: Minneapolis Public Schools' Actual Elementary School Districts or Attendance Areas, 1970-71 (Appendix A-1, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-87

Map: Minneapolis Public Schools' Hypothetical Elementary School Districts or Attendance Areas, 1977-78 (Appendix B-1, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) .... A-89

Map: Minneapolis Public Schools' Actual Elementary School Attendance Areas, 1977-78 (Appendix C-1, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-91

Chart: Concentration of Minority Pupils in Minneapolis Public Schools, 1970-71 (Actual), 1977-78 (Hypothetical) and 1977-78 (Actual) (Appendix D-1, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-93

Map: Minneapolis Public Schools' Percentages of Minority Pupils by Census Tract of Residence, 1977-78 (Appendix F, Supplement to Tenth Semi-Annual Report to District Court, Jan. 25, 1978) ..... A-95

## TABLE OF AUTHORITIES

**Cases:**

Alexis I. duPont School District v. Evans, petition for cert. docketed, No. 78-672 (U.S. Sup. Ct. Oct. 20, 1978) ..... 16

Armstrong v. Brennan, Nos. 76-1130, 77-1367 (7th Cir. Sept. 1, 1977), on remand sub nom. Armstrong v. O'Connell, 451 F.Supp. 817 (E.D. Wis. 1978) .. 17

Armstrong v. O'Connell, 427 F.Supp. 1377 (E.W. Wis. 1977) ..... 23

Austin Ind. School District v. United States, 429 U.S. 990 (1976) ..... 12

Brennan v. Armstrong, 433 U.S. 672 (1977) ..... 12

Brown v. Board of Education, 347 U.S. 483 (1954) . 11

Brown v. Board of Education, 349 U.S. 294 (1955) 11, 18

Columbus Bd. of Ed. v. Penick, 47 U.S.L.W. 3089 (U. S. Sup. Ct. Aug. 11, 1978) ..... 13

Columbus Bd. of Ed. v. Penick, *pet. for cert. docketed,* No. 78-610 (U.S. Sup. Ct. Oct. 11, 1978) .....15, 19

Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) ..... 12, 18

Dayton Bd. of Ed. v. Brinkman, *pet. for cert. docketed,* No. 78-627 (U.S. Sup. Ct. Oct. 13, 1978) ..... 16

DeFunis v. Odegaard, 416 U.S. 312 (1974) ..... 19

Delaware State Bd. of Ed. v. Evans, *petition for cert. docketed,* No. 78-671 (U.S. Sup. Ct. Oct. 20, 1978) 16

Fisher v. District Court, 424 U.S. 382 (1976) ..... 22

Hill v. Gautreaux, 425 U.S. 284 (1976) ..... 18

Keyes v. School Dist. No. 1, 412 U.S. 189 (1973) .... .....15, 18, 19, 23

Milliken v. Bradley, 418 U.S. 717 (1974) ..... 12

Milliken v. Bradley, 433 U.S. 267 (1977) ..... 18

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) ..... 22

Morton v. Mancari, 417 U.S. 535 (1974) ..... 22

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) ..... 18
Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 (1976) .....12, 17, 18, 20
Regents of Univ. of Calif. v. Bakke, — U.S. —, 57 L. Ed.2d 750 (1978) ..... 19
School Dist. of Omaha v. United States, 433 U.S. 667 (1977) ..... 12
Swann v. Charlotte-Mecklenburg, Bd. of Ed., 402 U.S. 1 (1971) .....11, 12, 16, 18
United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) ..... 19
United States v. Antelope, 430 U.S. 641 (1977) ..... 22
United States v. School Dist. of Omaha, 565 F.2d 127 (8th Cir.), *cert. denied*, 434 U.S. 1064 (1977) .... 17
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) ..... 18
Washington v. Davis, 426 U.S. 229 (1976) ..... 18

**Constitution, Statutes, Rules and Regulations:**

U.S. Const., 10th Amend ..... 18
20 U.S.C. §241aa (1976) .....4, 22
20 U.S.C. §241cc (1976) .....4, 22
20 U.S.C. §241dd (1976) .....4, 22
20 U.S.C. §887c (1976) .....4, 22
25 U.S.C. §450 (1976) .....4, 22
25 U.S.C. §450a (1976) .....4, 22
28 U.S.C. §1254(1)(1976) ..... 2
28 U.S.C. §1292(a) (1) (1976) ..... 5
28 U.S.C. §1343(3) (1976) ..... 4
28 U.S.C. §1343(4) (1976) ..... 4
28 U.S.C. §2101(c) (1976) ..... 2
42 U.S.C. §1981 (1976) ..... 4
42 U.S.C. §1983 (1976) ..... 4
Pub.L. 92-318, tit. IV §411(a), 86 Stat. 235, 334 (Jan. 23, 1972) ..... 4
Pub.L. 92-318, tit. IV §421(a), 86 Stat. 235, 339 (Jan. 23, 1972) ..... 4
Pub.L. 93-638 §2, 86 Stat. 2203 (Jan. 4, 1975) .... 4
Pub.L. 93-638 §3, 86 Stat. 2203 (Jan. 4, 1975) .... 4
45 CF.R. pts. 186-188 ..... 22
Fed. R. App. P. 4(a) ..... 5
Fed. R. Civ. P.
54(d) ..... 21
58 ..... 21
60(b)(5) ..... 4
65 ..... 4
65(d) ..... 21

**Miscellaneous:**

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Message from the President of the United States, *Recommendation for Indian Policy*, H.R. Doc. No. 363, 91st Cong., 2d Sess. 6 (1970) ..... 22
Minnesota Advisory Committee to the United States Commission on Civil Rights, *Bridging the Gap: The Twin Cities Native American Community* (Jan. 1975) ..... 22

Minnesota Advisory Committee to the United States Commission on Civil Rights, *Bridging the Gap: A Reassessment* (Jan. 1978) ..... 22
NAACP Legal Defense and Education Fund, *An Even Chance* (1971) ..... 22
Pettigrew, Useem, Norman & Smith, *Busing: A Review of the Evidence*, The Public Interest 88 (1972) ... 19
Ravitch, *The "White Flight" Controversy*, The Public Interest, Spring 1978, at 135 ..... 19
Report of the United States Commission on Civil Rights, *Fulfilling the Letter and the Spirit of the Law —Desegregation of the Nation's Public Schools* (Aug. 1976) ..... 7
Special Subcomm. on Indian Education, Sen. Comm. on Labor & Public Welfare, *Indian Education: A National Tragedy—A National Challenge*, S.Rep. No. 501, 91st Cong., 1st Sess. 1969) ..... 22
S. Rep. No. 93-682, 4 U.S. Code Cong. & Admin. News 7775 (1974) ..... 22
N. St. John, School Desegregation—Outcomes for Children (1975) ..... 19

IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, *et al.*,

*Petitioners,*

vs.

JEANETTE BOOKER, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Special School District No. 1, Minneapolis, Minnesota, its Superintendent, and the Chairperson of its Board of Education, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 12, 1978. Respondents are individual plaintiffs and a plaintiff class consisting of all children attending the Minneapolis public schools.

### Opinions Below

The October 12, 1978, opinion of the Eighth Circuit is not yet reported and is reproduced in the Appendix at pag-

es A-62-77. The May 22, 1978, Memorandum Order of the United States District Court for the District of Minnesota which was affirmed by the Eighth Circuit is reported at 451 F.Supp. 659 and is reproduced in the Appendix at pages A-37-58. The School District's applications for a stay of the May 22, 1978, Memorandum Order pending appeal therefrom were denied by the district court on June 23, 1978 (App. A-58-61), by the Eighth Circuit without opinion on July 27, 1978, and by Mr. Justice Blackmun as Circuit Justice without opinion on August 14, 1978 (No. A-156). The district court's original decision on the merits and desegregation decree are reported at 351 F.Supp. 799 and are reproduced in the Appendix at pages A-14-37.

### Jurisdiction

The judgment of the Eighth Circuit was entered on October 12, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1), 2101(c).

### Questions Presented

1(a). Should a school desegregation injunction be dissolved where the school district, pursuant to the court's order, had completely implemented an extensive desegregation/integration plan, as a result of which the school district had eliminated any incremental segregative effect of past wrongs and had substantially reduced systemwide concentration of minority pupils and where the district court had conceded that the school district had complied with the injunction in all other respects?

1(b). Should a district court's implied "findings of fact" be set aside as clearly erroneous when they ignored, and



were inconsistent with, uncontroverted evidence of the elimination of incremental segregative effects of past wrongs, substantial systemwide reduction of the concentration of minority pupils, and other indicia of an integrated school system?

2. Should a school desegregation injunction's maximum minority percentage requirement be modified so as to permit the school district to implement its preferred desegregation plan where the court's racial balance requirements were not based on the elimination of incremental segregative effect, where continued adherence to the court's racial balance requirement would interfere with the education of Native American children, would disrupt families and children already involved in extensive changes associated with past desegregation efforts, would exacerbate uncertainty and instability in the school system, and would stimulate latent racial consciousness and stigmatize racial minorities and where declining enrollment, an increasing proportion of minority students in the system and continued residential concentration of minority families made compliance with the court's racial balance requirements more difficult?

3. Is a school district's preferred desegregation/integration plan valid under the fourteenth amendment's equal protection clause where the plan does not assign pupils to schools on the basis of race but merely creates a different standard for restructuring of the school where there are existing concentrations of Native American pupils and where the plan facilitates and enhances the education of Native American children and their parents' participation and involvement in the educational process?

## Constitutional and Statutory Provisions Involved

This case involves the equal protection clause of the fourteenth amendment of the United States Constitution as well as provisions of the Indian Education Act (Pub.L. 92-318, tit. IV, §§411(a), 421(a), 86 Stat. 235, 334, 339 (June 23, 1972), 20 U.S.C. §§241aa, 241cc, 241dd, 887c (1976)) and provisions of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638, §§2, 3, 88 Stat. 2203 (Jan. 4, 1975), 25 U.S.C. §§450, 450a (1976)), which are presented in the Appendix at pages A-1-14.

## Statement of the Case

### 1. Nature of the Case.

This is an action commenced on August, 10, 1971, under 42 U.S.C. §§ 1981, 1983, thereby vesting jurisdiction in the district court under 28 U.S.C. §1343(3), (4). The complaint alleged that Special School District No. 1 ("the School District") had segregated its schools on the basis of race in violation of the equal protection clause of the fourteenth amendment to the United States Constitution, and plaintiffs sought an injunction to desegregate the schools.[1]

On May 22, 1978, the district court denied the School District's motions, pursuant to Rules 60(b)(5) and 65 of the Federal Rules of Civil Procedure, to dissolve or modify

[1]It should be noted that the population of Minneapolis has been overwhelmingly Caucasian and continues to be predominantly Caucasian. In recent years, however, it has acquired a minority population, principally of blacks and American Indians. But, as the Eighth Circuit said, "As in other cities throughout the country, the minority populations of Minneapolis were concentrated in limited areas due to economic conditions, low rent housing policies, and the natural desire of people of the same race or ethnic group to live in the same neighborhoods." (App. A-66-67.)



the desegregation decree originally entered on May 24, 1972. As a result, the district court ordered the School District to comply with the injunction, as further modified therein, in the 1978-79 and 1979-80 school years. (App. A-57-58.)

Within 30 days thereafter, the School District filed its Notice of Appeal therefrom, vesting jurisdiction in the Eighth Circuit under 28 U.S.C. §1292(a)(1) and Rule 4(a) of the Federal Rules of Appellate Procedure. On October 12, 1978, the Eighth Circuit entered its decision affirming the May 22, 1978, district court order. (App. A-62-77.)

### 2. The District Court's Original Decision.

After trial, the district court concluded that "there exists a condition of segregated schools in the City of Minneapolis, and that the intentional actions of the defendant are in part responsible for this condition." (App. A-33.)[2] This conclusion was based, in part, upon findings that the School District had acted in the 1960's with discriminatory intent in the use of portable classroom units at three schools, in the construction of additions to three schools, in the construction and location of a new school, and in the changing of boundaries and the failing to change other boundaries affecting one school. (App. A-17-21.) In addition, the court found that the School District had unconstitutionally segregated on the basis of race in allowing pupil transfers, creating and operating certain optional attendance zones, hiring and assigning minority certificated personnel, and

[2]The phrase "segregated schools" as used by the district court refers to schools whose racial composition differs significantly from the overall racial composition of the School District. (*See* App. A-15-17)

maintaining of eight schools as identifiably "black schools" (App. A-21-27.)[3]

Based upon the above conclusion and findings, the district court entered an order requiring the School District to proceed to implement its previously adopted desegregation/integration plan[4] with certain modifications. (App. A-34-36.)

The most important modification for present purposes was the imposition of a requirement "that no more than 35% of the student body of any one school consists of minority children." (App. A-35.) As the court said, "This is not to say that the Constitution requires a fixed racial balance in public schools. The Court only uses the figure as a 'useful starting point in shaping a remedy for past constitutional violations' . . . . This is a very limited use of a mathematical ratio since it will only affect five of the defendant's 94 schools. This is clearly within the equitable discretion of the Court." (App. A-35.)[5]

### 3. The Desegregation/Integration of the Minneapolis Public Schools.

The School District over the past six years has implemented a substantial desegregation/integration plan resulting in a multitude of significant changes in the organization and structure of the public schools in Minneapolis. This plan, now implemented, involved construction and purchase of new facilities at a total capital outlay of $30 million, closing of 21 old facilities, creation of school pairings and clusters, changes in grade structure and attendance boundaries, a six-fold increase in the number of students bused for desegregation/integration purposes, development of nonracist curriculum materials, the affirmative recruitment and hiring of minority personnel and the adoption and use of procedures to assure equality of resources throughout the system. Indeed, Minneapolis' desegregation efforts have been praised by the United States Civil Rights Commission. (Report of the United States Commission on Civil Rights, Fulfilling the Letter and the Spirit of the Law—Desegregation of the Nation's Public Schools, at 91-99, 204, 209-10, 216, 249, 252, 293 (Aug. 1976).)

As a result of the implementation of the desegregation/integration plan, any incremental segregative effects have been eliminated at the six schools for which there were specific findings of discriminatory acts in the assignment of pupils. (Graphs showing the uncontroverted evidence of "incremental segregative effect" and its elimination are in the Appendix at pages A-78-83.)[6]

Over and above the elimination of incremental segrega-

[3]In dictum, the district court said that "had it been necessary to have decided whether 'de facto' segregation as it exists in Minneapolis was constitutionally prohibited, this Court would have ruled that it was." (App. A-28 n.2.) This dictum, of course, has been rejected by this Court.

[4]On April 25, 1972, the School District had adopted a comprehensive desegregation/integration plan. This, however, was not the first Minneapolis desegregation/integration effort. As the district court noted in its original decision, the School District was "not a recalcitrant district whose promises were suspect." (App. A-34.)

[5]The acceptable percentages were changed by the court on May 7, 1975, to 42% total minority and 35% one minority and on May 22, 1978, to 39% of one minority and 46% total minority. (App. A-47-52.) In addition, there have been other orders and opinions by the district court since 1972 modifying the original decree in other respects.

[6]The district court also mentioned four other schools as identifiably "Black schools" but did not tie this fact to any specific discriminatory acts. (App. A-26.) Thus, as to these four schools, it is impossible to determine what the racial distribution would have been absent the violation, if any, and, therefore, what the incremental segregative impact was. It is significant, however, that the minority percentages at these four schools were substantially reduced. Moreover, all but four of the ten schools specifically mentioned in the original decision were in compliance with the district court's racial balancing requirements in 1974-75, and since 1975-76, all ten have been in compliance therewith except for slight deviations at one school in 1976-77 and at two schools in 1977-78.

tive effect at the six schools, there was uncontroverted evidence of substantial, systemwide reduction of concentration or isolation of minority pupils. Prior to the trial herein and prior to the School District's major desegregation/integration efforts, over one-fourth of all the minority students attended schools in which the minority percentage equaled or exceeded 55%. In contrast, after implementation of the plan, *no* minority students attended such schools. The effect and success of the plan is even more vividly shown by looking at the uncontroverted evidence of where the School District would have been this last school year had there been no plan. In this hypothetical 1977-78 school district, approximately 34% of all the minority pupils would have been in schools in which the minority percentage equaled or exceeded 55%. (Maps and graphs showing the uncontroverted evidence of these systemwide desegregation effects are in the Appendix at pages A-87-93.)[7]

On March 7, 1978, the School District adopted its preferred desegregation/integration plan for 1978-79 and the following three years. The preferred plan set a maximum minority percent in any school of 50% for total minorities, except that in any school with 15% or more Native American students, the maximum total minority would be 55%,

[7]The School District has also made substantial accomplishments in integration and in maintenance and enhancement of the quality of education. All of these accomplishments are all the more remarkable and praiseworthy in light of changing circumstances over which the School District had no control—declining city population, declining enrollment, increasing overall minority percentage of total enrollment and continued residential concentration of minority families, reduction of the School District's personnel force, inflation and a reduction in the financial wherewithal of the School District. The declining enrollment and increasing minority percentages are shown in graphs at pages A-84-85 of the Appendix, and the residential concentration of minority families is shown on the map at page A-95 of the Appendix.



and in any school with 30% or more Native American students there would be a maximum total minority of 60%. (There is only one school presently affected by these variances.) The preferred plan looked ahead for four years and provided a period of relative stability, much needed by the school system. In order to meet these principles, the preferred plan called for a number of actions affecting school organization and boundaries for this year.

In addition, on March 7, 1978, the School District's Board directed its attorneys to submit to the district court plans for compliance with the 35/42 percent guidelines although the Board and Administration believed them to be educationally unsound and not durable. The 35/42 plan contemplated the following actions for this school year over and above those under its preferred plan: closing five additional schools (one of which would be converted from a junior high to a special elementary fundamentals school); changing the boundaries for four additional elementary schools; changing the grade structure and attendance areas for eight other elementary schools; and abandoning the idea of voluntary desegregation for four elementary schools.

### 4. The Decisions Below.

On May 22, 1978, the district court, without making any express findings of fact despite the submission of considerable evidence on the issues of fact, denied the dissolution motion because, in its view, "neither defendants' statistical evidence nor any other demonstrated application of *Dayton* mandates or even supports immediate termination of jurisdiction. . . ." (App. A-47 *See* pp. 13-16, *infra*.) The court also denied the modification motion, except to increase the

permissible minority percentages by only four percentage points. The basic reasons here were that the court thought the allowable minority percentages requested by the School District were too high for Minneapolis, the School District's past desegregation planning had failed to allow a generous margin for errors in enrollment projections, and the variances for Native Americans in the preferred plan presented serious and difficult constitutional questions which the court chose to avoid. (App. A-47-57.)[8]

The Eighth Circuit's affirmance of the above order on October 12, 1978, was without any discussion or analysis of the legal issues or of whether the district court's "findings of fact" were clearly erroneous. Instead, after a lengthy summary of the history of the case, the court of appeals said that it "should pay great deference" to the district judge's conclusions in the delicate task of formulating a school desegregation decree. (App. A-77.) The court of appeals then tersely concluded: "We see nothing clearly erroneous in [Judge Larson's] factual findings; we see no misconceptions of law in his 1978 opinion; and we see no abuse of discretion in the results that he reached." (App. A-77.)

[8]On May 31, 1978—soon after the district court's denial of the School District's motions and ordering the School District to be within maximum minority percentages of 39% for one minority and 46% for total minority in the fall of 1978 and fall of 1979—the School District adopted new desegregation/integration plans for compliance with that order, and in the fall of this year, the School District implemented that plan for 1978-79.



## Reasons for Granting the Writ

### I.

### THE DECISIONS BELOW ARE IN CONFLICT WITH, AND MISAPPLY, DECISIONS OF THIS COURT HOLDING THAT DESEGREGATION DECREES MUST BE LIMITED TO THE ELIMINATION OF THE INCREMENTAL SEGREGATIVE EFFECT OF CONSTITUTIONAL VIOLATIONS AND MUST NOT REQUIRE ANNUAL ADJUSTMENTS OF THE RACIAL COMPOSITION OF THE SCHOOLS.

In its role of ultimate interpreter of the Constitution and supervisor of the lower federal courts, this Court from time to time has sought "to amplify guidelines, however incomplete and perfect, for the assistance of school authorities and courts" in implementing the basic principles of *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954) (*Brown I*), and *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*). (*E.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 14 (1971)). In June 1977, this Court returned to this task and enunciated a new, and more specific, guideline for judicial remedies in a case where "mandatory segregation by law of the races in the schools has long since ceased." According to this Court, the district court must

> "first determine whether there was any action in the conduct of the business of the school board which intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must *determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently con-*

> *stituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." Dayton Bd. of Ed.* v. *Brinkman,* 433 U.S. 406, 420 (1977) (citations omitted; emphasis added); *School Dist. of Omaha* v. *United States,* 433 U.S. 667 (1977); *Brennan* v. *Armstrong,* 433 U.S. 672 (1977).[9]

Armed with these cases, and especially the new guidelines of *Dayton* and the principles of *Pasadena,* and the uncontroverted evidence of the elimination of incremental segregative effects as well as the substantial systemwide reduction of concentration of minority pupils, the Minneapolis School District moved to dissolve the six-year old desegregation injunction so that the School District could implement its preferred further desegregation plan without court supervision. The rejection of the motion by the lower courts, it is submitted, conflicts with, and misapplies, the above decisions of this Court for the following reasons:

[9]Prior to June 1977, this Court had determined that "the task [of a desegregation decree] is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution" or, in other words, "the nature of the violation determines the scope of the remedy;" that there is no substantive constitutional right to any particular degree of racial balance or mixing; that the existence of some one-race or virtually one-race or racially identifiable schools is not in and of itself a sign of an unconstitutionally segregated school system; that racial balance or quotas may only be used as "a starting point in the process of shaping a remedy, rather than an inflexible requirement", where the schools had totally failed to come forward with an acceptable desegregation plan; and that annual adjustments of a school system to alter the racial composition of the schools are not constitutionally required once the affirmative duty to desegregate has been accomplished. (*Austin Ind. School Dist.* v. *United States,* 429 U.S. 990 (1976) (Powell, J. concurring); *Pasadena City Bd. of Ed.* v. *Spangler,* 427 U.S. 424 (1976); *Milliken* v. *Bradley,* 418 U.S. 717 (1974) *(Milliken I); Swann* v. *Charlotte-Mecklenburg Bd. of Ed., supra.)*



*First,* the district court erroneously refused to see the significance of *Dayton.* According to the district court, *Dayton* was not "a statement of particularly novel legal principles for school desegregation cases" and had "little application to the motion to terminate jurisdiction" or "little application where the segregative effect has already been determined to have been pervasive and to require a systemwide remedy." (App. A-41, 47.) This view was endorsed by the Eighth Circuit without analysis or discussion. (App. A-77.) This approach was precisely that of the Sixth Circuit in the *Columbus* and *Dayton* cases, an approach criticized by Mr. Justice Rehnquist as one evincing "an unduly grudging application of Dayton" and requiring review by this Court. (*Columbus Bd. of Ed.* v. *Penick,* 47 U.S.L.W. 3089 (U.S. Sup. Ct. Aug. 11, 1978) (Rehnquist, J., in Chambers).)

*Second,* the district court erroneously rendered it impossible to prove the presence of, or the elimination of, incremental segregative effect in any northern desegregation case, contrary to this Court's intent. The court here rejected uncontroverted evidence of the remedying of incremental segregative effect because it doubted "that the Supreme Court intended *Dayton* to be quantified in precisely this manner." (App. A-43.) In addition, the district court thought that the evidence of elimination of incremental segregative effect was based upon a "judgment as to why the discriminatory act occurred, a guess as to what might have happened had it not occurred, a tendency to erase from the hypothetical not only the discriminatory act but other historical events as well, and a failure to account for the repercussions of such changes," most particularly "the interrelationship of schools and housing patterns." (App. A-44 and n.4.) More fundamentally, though, the district court con-

cluded that the uncontroverted evidence of the remedying of incremental segregative effect "illustrates the futility of attempting to assess the schools on anything other than a systemwide basis, for events at one school profoundly affect events at another" and that "*Dayton* cannot be interpreted so 'mathematically'." (App. A-45 and n.5.) This last conclusion was coupled with the statement that "no court in any school case will ever be able to say with any assurance 'where people would have lived, where schools would have been located or how much integration would have obtained' absent officially imposed discrimination." (App. A-45 and n.5.) In short, for the district court, it is impossible to prove incremental segregative effect in a quantative manner and thus impossible for a school district to justify the dissolution of a desegregation decree. Thus, the district court ignored the uncontroverted evidence of the elimination of incremental segregative effect and systemwide reduction of isolation of minority students and failed to enter any findings of fact (App. A-40-47).[10] Here too, the court of appeals approved of this conclusion and these "findings of fact" without any discussion whatsoever. (App. A-77.)

*Third*, the district court was so anxious to get around *Dayton* that it ignored its own remarks about the inherent difficulties in any systemwide school case of proving a precise mathematical incremental segregative effect and rejected the School District's contention that *Dayton* had—and had to have—a qualitative meaning.[11] (App. A-45-46.) According to the district court, the qualitative approach "appears to carry *Dayton* far beyond acceptable limits of abstraction", and the court saw "nothing in *Dayton* to warrant such an analysis." (App. A-45-46 and n.5.) Again, the court of appeals put its stamp of approval on this conclusion. (App. A-77.)

*Fourth*, the district court's failure and refusal to follow *Dayton* and other recent cases left it with no choice but erroneously to seek to achieve some predetermined racial and ethnic balance in the schools. Announcing for the first time in the litigation that it had "set the guidelines at approximately 20% above the projected total minority population," the district court fixed a maximum of 39% of a single minority and 46% total minority for the next two school years. (App. A-51-52.)[12] But the 20% factor has no demonstrated factual basis anywhere in the entire record of this litigation, has not been consistently applied and updated, and if the district court is not reversed, may not be consistently applied and updated in the future. (App. 49-50.) Most importantly, the use of a maximum percentage for minority enrollment in a city like Minneapolis with residential concentrations of minority families and children must rest on the inherently incredible assumption that there was a uniform "incremental segregative effect" throughout the

[10]The district court also rejected the above evidence because the court felt that the evidence offered neutral non-segregative reasons for the challenged conduct and that it was inappropriate at this stage of the litigation to re-examine the validity of the unchallenged May 1972 findings. (App. A-46 n.6.) But the offered neutral non-segregative reasons are not inconsistent with the trial evidence or with the School District's position at trial. Furthermore, to prevent the School District from presenting evidence on incremental segregative effect under *Dayton* runs afoul of the well-established principles of equity that an injunction should be modified or dissolved in light of new circumstances of law or fact.

[11]A qualitative approach to *Dayton* in a systemwide case is consistent with the comments of Mr. Justice Powell regarding "the contour characteristics of an integrated school system in which all citizens and pupils may justifiably be confident that racial discrimination is neither practiced nor tolerated." (*Keyes* v. *Special School Dist. No. 1*, 412 U.S. at 226-27 (Powell, J., concurring).)

[12](*Compare* Petition for Certiorari, at 26 n.10, *Columbus Bd. of Ed.* v. *Penick*, No. 78-610 (Oct. 11, 1978) (decree set limits on a school's black enrollment at ≠ 15% of total district-wide black enrollment).)

city.[13] Yet here too the court of appeals did not correct the error. (App. A-77.) The lower courts' use of arbitrary percentages cannot be supported by precedent. (*E.g., Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 25.) Here, the percentages are not now being used as a "useful starting point", but rather as an inflexible ending point.

*Fifth*, the lower courts' erroneous determination of law also caused them to ignore other indicia of an integrated school system *(see* pp. 6-8 *supra)*, to interfere with the efforts of the School District to improve the education of Native American children (see pp. 21-22 *infra)*, and to ignore uncontroverted evidence that the "remedial" use of racial criteria in the court's desegregation decree was stimulating latent racial consciousness and stigmatizing racial minorities.

Minneapolis is perhaps unique in the amount of desegregation already accomplished and in the existence of specific evidence showing incremental segregative effect and its elimination. It, however, is not unique in the failure of the lower courts to grasp the controlling principle of the decisions of this Court since *Swann*, including *Dayton*, *Omaha* and *Brennan*. Similar and related issues of appropriate desegregation remedies are raised in at least four applications for certiorari now pending before this Court. (*Columbus Bd. of Ed.* v. *Penick*, No. 78-610 (Oct. 11, 1978); *Dayton Bd. of Ed.* v. *Brinkman*, No. 78-627 (Oct. 13, 1978); *Alexis I. duPont School Dist.* v. *Evans*, 78-672 (Oct. 20, 1978); *Delaware State Bd. of Ed.* v. *Evans*, No. 78-671 (Oct. 20, 1978).) Similar issues are also still

[13]The district court's use of the racial percentage requirements may well stem from its now discredited view that *de facto* segregation was unconstitutional and that racially identifiable schools were unconstitutional. (*See* App. A-17-18, 26, 28.)



unresolved in the Omaha and Milwaukee cases which were part of the June 1977 trilogy. (*United States* v. *School Dist. of Omaha*, 565 F.2d 127, 128 (8th Cir. 1977) (*en banc per curiam*), *cert. denied*, 434 U.S. 1064 (1978) (remand of remedy question to district court, where the hearing on same is scheduled to commence on December 4, 1978); Order, *Armstrong* v. *Brennan*, Nos. 76-1130, 77-1367 (7th Cir. Sept. 1, 1977) (remand of Milwaukee case to the district court for further proceedings consistent with the Supreme Court's decision), *on remand sub nom. Armstrong* v. *O'Connell*, 451 F.Supp. 817 (E.D. Wis. 1978) (after findings that Milwaukee school officials had acted with discriminatory intent, trial on the question of incremental segregative effect was completed on October 25, 1978).) Even the Pasadena case, which this Court in 1976 may have assumed would soon be terminated, is still languishing in the lower courts. (*Spangler* v. *Pasadena City Bd. of Ed.*, Nos. 77-2902, 77-2941, 78-2266 (9th Cir.) (argument in the court of appeals is scheduled for December 7, 1978).[14] Furthermore, "the *Dayton* issues" have to permeate many other desegregation cases now pending or brought hereafter.

The importance of the Minneapolis case and the related certiorari petitions now pending before this Court goes beyond the lower federal courts' failure or inability to follow this Court's persistent rulings on remedies. By failing to abide by the remedy precedents and by ordering desegregation over and above that required to eliminate incremental

[14]Indeed, the continuation of the Pasadena litigation, the dearth of lower court precedents granting motions to dissolve desegregation decrees and certain comments of the Eighth Circuit at the argument in the instant case (App. A-61-62) make one wonder whether a desegregation case, once commenced, is, in the view of the lower courts, destined for permanent status on the docket of a district court.

segregative effects, the lower courts are implicitly calling into question this Court's rulings that proof of discriminatory or segregative intent or purpose is a necessary condition for proving violations of the equal protection clause;[15] that segregatory intent or motive is not a sufficient condition for the constitutional violation and that there must also be proof of causation, *i.e.*, proof that the act complained above would not have occurred in the absence of the impermissible purpose or motive;[16] that a city's having "both predominantly black and predominantly white schools . . . is not alone violative of the Equal Protection Clause;"[17] and that school desegregation decrees must recognize the vital national tradition of local autonomy of school districts.[18] Finally, non-adherence to the above limitations on federal judicial power fails to recognize that governmental decisions based on race which are not aimed at redressing an adjudicated wrong raise profound constitutional questions and that the considerations which have led this Court to treat race as a constitutionally suspect

[15]*See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *Keyes* v. *Special School Dist. No. 1*, 413 U.S. at 208.

[16]*Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. at 270 n.21 (1977); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274, 285-87 (1977).

[17]*Washington* v. *Davis*, 426 U.S. at 240; *see also Dayton Bd. of Ed.* v. *Brinkman*, 433 U.S. at 413; *Austin Ind. School Dist.* v. *United States*, 429 U.S. at 992-95 (Powell, J., concurring); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. at 436; *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 24.

[18]*Dayton Bd. of Ed.* v. *Brinkman*, 433 U.S. at 410; *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977) *(Milliken II)*; *Hill* v. *Gautreaux*, 425 U.S. 284, 293-94 (1976); *Keyes* v. *Special School Dist. No. 1*, 413 U.S. at 240-53 (Powell, J., concurring); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 16, 30-31; *Brown II*, 349 U.S. at 300. The tradition of local autonomy of schools is more than that; it is rooted in the constitutional allocation of powers between the federal government, on the one hand, and state and local governments, on the other hand. (U.S. Const., 10th amend.)



classification are not entirely vitiated in a remedial context.[19]

Obviously, this Court should not, and cannot, be the court to decide the proper remedy for every school desegregation case in the country, and it is necessary that this Court look to the district courts in the first instance and then to the courts of appeals to resolve almost all such cases. But the apparent gulf presently existing between this Court and the lower federal courts on this important issue creates an intolerable situation—bewilderment and uncertainty by school systems and their attorneys as to what the law is and the resulting encouragement of prolonged, complex and expensive litigation involving urban school systems caught in the pincers of desegregation costs, inflation and reduction of revenues associated with declining enrollments.[20]

[19]*Regents of Univ. of Calif.* v. *Bakke*, — U.S. —, 57 L.Ed.2d 750, 776 (Powell, J.), 815-16 (Brennan, J.) (1978); *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 172-74 (1977) (Brennan, J., concurring); *DeFunis* v. *Odegaard*, 416 U.S. 312, 337-43 (1974) (Douglas, J., dissenting).

[20]This economic problem is apparently most severe in the State of Ohio. (*See e.g.*, Petition for Certiorari at 15 n.5, *Columbus Bd. of Ed.* v. *Penick*, No. 78-610 (Oct. 11, 1978).) And while the financial well-being of the Minneapolis system is and promises to be secure, Minneapolis suffers from some of the same problems. These problems of the urban school systems seem particularly unfair given that nearby suburban districts usually escape the burdens of desegregation and that the academic community is waging spirited debate on the intractable issues of whether there is a demonstrable correlation between desegregation and academic performance and whether desegregation orders contribute to the decline of the central cities. (*See, e.g., Keyes* v. *Special School Dist. No. 1*, 413 U.S. at 244-50 (Powell, J., concurring); Armour, *The Evidence on Busing*, The Public Interest (Summer 1972); Dr. James Coleman, *Can We Revitalize Our Cities?*, Challenge, Nov-Dec. 1977, at 23; Dr. James Coleman, *Can We Integrate Our Public Schools Without Busing?*, Chicago Tribune, Sept. 17, 1978, at p. 1; Feinberg, *Integration Benefits Doubted*, Wash. Post, Sept. 18, 1978, at A1; Green & Pettigrew, *Urban Desegregation and White Flight: A Response to Coleman*, Phi Delta Kappan 399 (Feb. 1976); Pettigrew, Useem, Norman & Smith, *Busing: A Review of the Evidence*, The Public Interest 88 (1972); Ravitch, *The "White Flight" Controversy*, The Public Interest, Spring 1978, at 135; *N. St. John, School Desegregation—Outcomes for Children* (1975).

## II.

## THE DECISIONS BELOW CONFLICT WITH, AND MISAPPLY, DECISIONS OF THIS COURT ALLOWING MODIFICATION OF DESEGREGATION DECREES WHERE NEW CIRCUMSTANCES OF LAW OR FACT HAVE ARISEN

In *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. at 437, this Court recognized that under well-established equitable principles "a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."

Here, there was uncontroverted evidence of significant changes in factual circumstances affecting the schools—declining overall enrollment, increasing minority enrollment, prior school reorganization and restructuring as a result of desegregation/integration efforts, a decline in the relative financial wherewithal of the schools—and persistent relative residential concentration of minority families and children. Moreover, there was evidence that adherence to the district court's racial percentages would disrupt families, students and communities already involved in desegregation/integration and interfere with the education of American Indian children *(see* pp. 21-22 *infra)*, whereas the School District's own preferred plan requiring a modification of the decree would minimize these disruptions and would give proper weight to the interests of local authorities in managing their own affairs.

Yet the district court ignored the principles of *Pasadena* and the evidence, and denied the modification motion and required the School District to come forward with another



plan, one which it did not prefer, an error uncorrected by the appellate court. (The district court did increase the racial percentages by four points. This was helpful to the School District but was not sufficient to permit the implementation of its preferred plan.)[21]

## III.

## THE DECISIONS BELOW ERRONEOUSLY DETERMINED IMPORTANT CONSTITUTIONAL AND FEDERAL STATUTORY ISSUES REGARDING THE EDUCATION OF AMERICAN INDIAN CHILDREN.

The lower courts' rejection of the dissolution and modification motions was also based upon the district court's views as to the School District's provisions for Native American children in its preferred desegregation plan. First, the district court believed that the School District's preferred plan raised difficult and serious constitutional issues, which the court discussed and then declined to decide. The court thereby put a legal cloud on the School District's suggested approach, but did not provide a definitive opinion. (App. A-53-57.) Second, the district court believed—contrary to the opinion of the School District and the parents of the children—that the conceded special educational needs of American Indian children could just as effectively be met by compliance with the court's raised

[21]The district court also failed to put the requirements into a single carefully drawn injunction document such as was requested by the School District. As a result, it is unnecessarily difficult to determine exactly what is required by the injunction, and speedy termination of the litigation is not advanced. (*See* Fed.R.Civ.P. 54(d), 58, 65(d); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. at 439.) This is not a scrivener's issue, as this Court pointed out in *Pasadena*. Indeed, this type of order by a district court, uncorrected by a court of appeals, may well contribute to a court's failure to follow the dictates of this Court on the limits to desegregation remedies.

balancing requirements as by implementing the preferred plan. (App. A-56-57.) Again, the Eighth Circuit endorsed this approach without extensive analysis and without considering the record. (App. A-75-77.)

These actions by the lower court are particularly troublesome given the national recognition of the special educational needs of Native American children,[22] the national commitment to maximizing Native American parental and community involvement in the education of their children as an important ingredient in improving the educational performance of their children,[23] and this Court's validation of special treatment of Native Americans which is rationally tied to the fulfillment of Congress's unique obligation toward the Indians. (*United States* v. *Antelope*, 430 U.S. 641 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 426 U.S. 463 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).) The decisions of the courts below are also contrary to the specific recommendation of the Minnesota Advisory Committee to the United States Commission on Civil Rights. (Minn. Advisory Comm. to U.S. Civil Rights Comm'n, *Bridging the Gap: A Reassessment* at 22 (Jan. 1978).)

[22]*Message from the President of the United States, Recommendation for Indian Policy*, H.R.Doc. No. 363, 91st Cong., 2d Sess. 6 (1970); *Special Subcomm. on Indian Education, Sen. Comm. on Labor & Public Welfare, Indian Education: A National Tragedy - A National Challenge*, S. Rep. No. 501, 91st Cong. 1st. Sess. (1969) [hereafter "*Special Subcommitte Report*"]; *Minn. Advisory Comm. to the Civil Rights Comm'n, Bridging the Gap: The Twin Cities Native American Community* at 92 (Jan. 1975); *Minn. Advisory Comm. to the Civil Rights Comm'n, Bridging the Gap: A Reassessment* at 1-2, 9-14 (Jan. 1978); *NAACP Legal Defense and Educational Fund, An Even Chance* at 2 (1971).

[23]20 U.S.C. §§ 241aa, 241cc, 241dd, 887c; 25 U.S.C. §§ 450, 450a (App. A-1-14); 45 C.F.R. pts. 186, 187, 188; *Special Subcommittee Report* 9-21; 4 *U.S. Cong. Code Cong. & Admin News* 7775 (1974) (S. Rep. No. 93-682).



While these issues do not have the broad applicability of the other issues raised herein,[24] they do raise difficult[25] and important issues of federal policy and legislation which require review by this Court.

## Conclusion

This Court should issue a writ of certiorari to correct the substantial legal errors committed by the courts below and to set forth even more explicit standards confining equitable decrees to the demonstrated effects of specific unconstitutional conduct on the part of school officials and demanding dissolution of same upon compliance with properly limited decrees. In granting the Minneapolis petition and reviewing the case on the merits, this Court would once again make clear that school desegregation decrees must be remedial, not punitive, must be molded with an even-handed spirit of balance and flexibility, and must not overzealously pursue a single goal. (*E.g, Keyes* v. *Special School Dist. No. 1*, 413 U.S. at 240-53 (Powell, J., concurring); *cf.* L. Hand, The Spirit of Liberty 21-22, 181-82, 217-19 (Dilliard ed. 1952); Mendelson, *Learned Hand: Patient Democrat*, 76 Harv.L.Rev. 322 (1962).)

[24]The problem of addressing the special educational needs of American Indian children in the context of a desegregation case is also present in Milwaukee. (*See Armstrong* v. *O'Connell*, 427 F.Supp. 1377, 1380 (E.D. Wis. 1977).)

[25]Even the district court below characterized the Indian education issues as a difficult. (App. A-53, 59.)

For these reasons, a writ of certiorari should issue to review the judgment of the Eighth Circuit Court of Appeals.

Dated: November 10, 1978.

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# APPENDIX

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United States Constitution, Fourteenth Amendment, Section 1:

> ". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the laws."

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Indian Education Act, Pub. L. 92-318, tit. IV, §411(a), 86 Stat. 334 (June 23, 1972), 20 U.S.C. §241aa (1976):

> **Congressional Declaration of Policy**
>
> (a) In recognition of the special educational needs of Indian students in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out elementary and secondary school programs specially designed to meet these special educational needs.
>
> (b) The Commissioner shall, in order to effectuate the policy set forth in subsection (a) of this section, carry out a program of making grants to local educational agencies which are entitled to payments under this subchapter and which have submitted, and had approved, applications therefor, in accordance with the provisions of this subchapter.

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Indian Education Act, Pub. L. 92-318, tit. IV, §411(2), 86 Stat. 235, 339 (June 23, 1972), 20 U.S.C. §241cc (1976):

**Uses of Federal Funds**

Grants under this subchapter may be used, in accordance with applications approved under section 241dd of this title, for—

(1) planning for and taking other steps leading to the development of programs specifically designed to meet the special educational needs of Indian children, including pilot projects designed to test the effectiveness of plans so developed; and

(2) the establishment, maintenance, and operation of programs, including, in accordance with special regulations of the Commissioner, minor remodeling of classroom or other space used for such programs and acquisition of necessary equipment, specially designed to meet the special educational needs of Indian children.

---

Indian Education Act, Pub. L. 92-318 tit. IV, §411(a), 86 Stat. 235, 339 (June 23, 1972), 20 U.S.C. §241dd (1976):

**Applications for Grants; Conditions for Approval; Reports; Amendments**

(a) A grant under this subchapter, except as provided in section 241bb(b) of this title, may be made only to a local educational agency or agencies, and only upon application to the Commissioner at such time or times, in such manner, and containing or accompanied by such information as the Commissioner deems necessary. Such application shall—

(1) provide that the activities and services for



which assistance under this subchapter is sought will be administered by or under the supervision of the applicant;

(2) set forth a program for carrying out the purposes of section 241cc of this title, and provide for such methods of administration as are necessary for the proper and efficient operation of the program;

(3) in the case of an application for payments for planning, provide that (A) the planning was or will be directly related to programs or projects to be carried out under this subchapter and has resulted, or is reasonably likely to result, in a program or project which will be carried out under this subchapter, and

(B) the planning funds are needed because of the innovative nature of the program or project or because the local educational agency lacks the resources necessary to plan adequately for programs and projects to be carried out under this subchapter;

(4) provide that effective procedures, including provisions for appropriate objective measurement of educational achievement will be adopted for evaluating at least annually the effectiveness of the programs and projects in meeting the special educational needs of Indian students;

(5) set forth policies and procedures which assure that Federal funds made available under this subchapter for any fiscal year will be so used as

to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available by the applicant for the education of Indian children and in no case supplant such funds;

(6) provide for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the applicant under this subchapter; and

(7) provide for making an annual report and such other reports, in such form and containing such information, as the Commissioner may reasonably require to carry out his functions under this subchapter and to determine the extent to which funds provided under this subchapter have been effective in improving the educational opportunities of Indian students in the area served, and for keeping such record and for affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports.

(b) An application by a local educational agency or agencies for a grant under this subchapter may be approved only if it is consistent with the applicable provisions of this subchapter and—

(1) meets the requirements set forth in subsection (a) of this section;

(2) provides that the program or project for which application is made—



(A) will utilize the best available talents and resources (including persons from the Indian community) and will substantially increase the educational opportunities of Indian children in the area to be served by the applicant; and

(B) has been developed—

(i) in open consultation with parents of Indian children, teachers, and, where applicable, secondary school students, including public hearings at which such persons have had a full opportunity to understand the program for which assistance is being sought and to offer recommendations thereon, and

(ii) with the participation and approval of a committee composed of, and selected by, parents of children participating in the program for which assistance is sought, teachers, and, where applicable, secondary school students of which at least half the members shall be such parents;

(C) sets forth such policies and procedures as will insure that the program for which assistance is sought will be operated and evaluated in consultation with, and the involvement of, parents of the children and representatives of the area to be served, including the committee established for the purposes of clause (2)(B)(ii).

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pur-

suant to regulations, be subject to approval in the same manner as original applications.

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Indian Education Act, Pub. L. 92-318, tit. IV, §421(a), 86 Stat. 235, 339 (June 23, 1972), 20 U.S.C. §887c (1976):

**Improvement of Educational Opportunities for Indian Children—Special Programs and Projects; In-Service Programs: Indians, Preference**

(a) The Commissioner shall carry out a program of making grants for the improvement of educational opportunities for Indian children—

(1) to support planning, pilot, and demonstration projects, in accordance with subsection (b) of this section, which are designed to test and demonstrate the effectiveness of programs for improving educational opportunities for Indian children;

(2) to assist in the establishment and operation of programs, in accordance with subsection (c) of this section, which are designed to stimulate (A) the provision of educational services not available to Indian children in sufficient quantity or quality, and (B) the development and establishment of exemplary educational programs to serve as models for regular school programs in which Indian children are educated;

(3) to assist in the establishment and operation of preservice and inservice training programs, in accordance with subsection (d) of this section, for persons serving Indian children as educational personnel; and



(4) to encourage the dissemination of information and materials relating to, and the evaluation of the effectiveness of, education programs which may offer educational opportunities to Indian children.

In the case of activities of the type described in clause (3) preference shall be given to the training of Indians.

**Planning, Pilot, and Demonstration Projects**

(b) The Commissioner is authorized to make grants to State and local educational agencies, federally supported elementary and secondary schools for Indian children and to Indian tribes, organizations, and institutions to support planning, pilot, and demonstration projects which are designed to plan for, and test and demonstrate the effectiveness of, programs for improving educational opportunities for Indian children, including—

(1) innovative programs related to the educational needs of educationally deprived children;

(2) bilingual and bicultural education programs and projects;

(3) special health and nutrition services, and other related activities, which meet the special health, social, and psychological problems of Indian children; and

(4) coordinating the operation of other federally assisted programs which may be used to assist in meeting the needs of such children.

**Educational Enrichment Programs and Services**

(c) The Commissioner is also authorized to make grants to State and local educational agencies and to tribal and other Indian community organizations to assist and stimulate them in developing and establishing educational services and programs specifically designed to improve educational opportunities for Indian children. Grants may be used—

(1) to provide educational services not available to such children in sufficient quantity or quality, including—

(A) remedial and compensatory instruction, school health, physical education, psychological, and other services designed to assist and encourage Indian children to enter, remain in, or reenter elementary or secondary school;

(B) comprehensive academic and vocational instruction;

(C) instructional materials (such as library books, textbooks, and other printed or published or audiovisual materials) and equipment;

(D) comprehensive guidance, counseling, and testing services;

(E) special education programs for handicapped;

(F) preschool programs;

(G) bilingual and bicultural education programs; and



(H) other services which meet the purposes of this subsection; and

(2) for the establishment and operation of exemplary and innovative educational programs and centers, involving new educational approaches, methods, and techniques designed to enrich programs of elementary and secondary education for Indian children.

**Education Personnel; Indians, Preference**

(d) The Commissioner is also authorized to make grants to institutions of higher education and to State and local educational agencies, in combination with institutions of higher education, for carrying out programs and projects—

(1) to prepare persons to serve Indian children as teachers, teacher aides, social workers, and ancillary educational personnel; and

(2) to improve the qualifications of such persons who are serving Indian children in such capacities.

Grants for the purposes of this subsection may be used for the establishment of fellowship programs leading to an advanced degree, for institutes and as part of a continuing program, for seminars, symposia, workshops, and conferences. In carrying out the programs authorized by this subsection, preference shall be given to the training of Indians.

**Information Dissemination; Program Evaluation**

(e) The Commissioner is also authorized to make grants to and contracts with, public agencies, and institutions and Indian tribes, institutions, and organizations for—

(1) the dissemination of information concerning education programs, services, and resources available to Indian children, including evaluations thereof; and

(2) the evaluation of the effectiveness of federally assisted programs in which Indian children may participate in achieving the purposes of such programs with respect to such children.

**Applications for Grants; Time of Submission; Information; Parental Participation**

(f) Applications for a grant under this section shall be submitted at such time, in such manner, and shall contain such information, and shall be consistent with such criteria, as may be established as requirements in regulations promulgated by the Commissioner. Such applications shall—

(1) set forth a statement describing the activities for which assistance is sought;

(2) in the case of an application for the purposes of subsection (c) of this section, subject to such criteria as the Commissioner shall prescribe, provide for the use of funds available under this section, and for the coordination of other resources available to the applicant, in order to insure that, within the scope of the purpose of the project,



there will be a comprehensive program to achieve the purposes of this section;

(3) in the case of an application for the purposes of subsection (c) of this section, make adequate provision for the training of the personnel participating in the project; and

(4) provide for an evaulation of the effectiveness of the project in achieving its purposes and those of this section.

The Commissioner shall not approve an application for a grant under subsection (b) or (c) of this section unless he is satisfied that such application, and any documents submitted with respect thereto, show that there has been adequate participation by the parents of the children to be served and tribal communities in the planning and development of the project, and that there will be such a participation in the operation and evaluation of the project. In approving applications under this section, the Commissioner shall give priority to applications from Indian educational agencies, organizations, and institutions.

**Authorization of Appropriations**

(g) For the purpose of making grants under this section there are hereby authorized to be appropriated $25,000,000 for the fiscal year ending June 30, 1973, and $35,000.000 for each of the two succeeding fiscal years.

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Indian Self Determination and Education Assistance Act, Pub. L. 93-638, §2, 88, Stat. 2203 (Jan. 4, 1975), 25 U.S.C. §450 (1976):

**Congressional Statement of Findings**

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and



(3) parental and community control of the educational process is of crucial importance to the Indian people.

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Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, §3, 88 Stat. 2203 (Jan. 4, 1975), 25 U.S.C. §450a (1976):

**Congressional Declaration of Policy**

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desire of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve

the measure of self-determination essential to their social and economic well-being.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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JEANETTE BOOKER, by CURTIS C. CHIVERS, her grandfather and guardian ad litem; DAVID G. HAGE, by GEORGE S. HAGE, his father and guardian ad litem; and MONTEZ WILLIS, by JAMES M. WILLIS, her father and guardian ad litem, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota,

Defendant.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

No. 4-71-Civil 382

(Date Entered, May 24, 1972)

Plaintiffs are all school children residing in Minneapolis, Minnesota. This case was instituted by their respective guardians ad litem pursuant to Rule 17(c) F.R. Civ. P. as a class action under Rule 23 F.R. Civ. P. On February 8, 1972, this Court determined that the suit was an appro-



priate one for a class action and ordered that the class would consist of "all children who are residents of Minneapolis and who attend its public schools."

Plaintiffs complain that defendant has denied the class which they represent an equal educational opportunity by maintaining segregated schools. They further allege that this discrimination on the basis of race is a deprivation of their liberty without due process of law. It is plaintiffs' contention that these acts are violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1981 and § 1983. Jurisdiction is invoked pursuant to 28 U.S.C. § 1343(3) and (4).

## CONTENTIONS OF THE PARTIES

Plaintiffs contend that there is and has been a continuous and intensifying pattern of segregation in the schools of the City of Minneapolis. Generally, they assert that this pattern is the result of two factors—(1) the imposition by the school board of a neighborhood school system in a city which is beset with intentional and widespread racial discrimination in housing, and (2) specific acts on the part of the defendant which it knew, or should have known, would create segregated schools.

Defendant admits that the schools of the City of Minneapolis are segregated. However, it is the District's contention that segregation has been caused by factors over which it neither had nor has control, *i.e.*, racially segregated housing patterns. It asserts that there has been no intention or purpose on its part to create or further segregation in the Minneapolis school system. Indeed, the District points to its Human Relations Guidelines of 1967

and 1970, as well as its 1972 Plan for Desegregation/Integration as indicia of its firm resolve to eliminate segregation which has been caused by discriminatory housing practices. Defendant further contends that a lack of intent to segregate on its part renders this Court powerless to grant the relief requested by plaintiffs, since a school district is under no constitutional duty to remedy that which it has not caused.

This Court feels little need to philosophize on the evils of racial segregation, other than to note its firm belief that it is both a moral and a legal wrong. The Court finds it unnecessary to make findings concerning the psychological harm inflicted by separation of the races. It is this Court's opinion that such findings, even buttressed by the most authoritative sociological and psychological data, are irrelevant to this lawsuit. Civil rights are not premised on sociological data, or moral platitudes. Instead, they are rooted solely in that "living document" which contains the very essence of American life—the Constitution. That document, and it alone, must provide the answers in this case. Neither sociologists' findings nor the clamour of misguided extremists have any bearing on the rights of these plaintiffs. The answer can only come from sober judicial reflection, free from the rhetoric of would-be demagogues and frightened parents.

It is an uncontroverted fact that the schools of the City of Minneapolis are segregated. Segregation imposed by law is unconstitutional. *Brown v. Board of Education*, 347 U.S. 483 (1954). Therefore it is the duty of this Court to objectively examine the facts in an effort to determine if the defendant has fulfilled its constitutional duty to the plaintiffs and, if not, what more must be done. This is not an



effort to assess blame; it is an effort to vindicate plaintiffs' rights. Blame for segregation rests firmly on the shoulders of all of us.

## FINDINGS OF FACT

1. The defendant herein operates 68 elementary schools, 15 junior high schools, and 11 high schools within its boundaries, which includes all of the City of Minneapolis, Minnesota.

2. For the 1971-1972 school year 65,201 students were enrolled in the District. Of these, 55,735 were Caucasian, 6,351 were Black, 2225 were American Indian, and 890 were of other minority or ethnic backgrounds.

3. There are 3,923 certificated personnel employed by the District. Of these, 3657 are Caucasian and 266 are Minority Americans.

4. The schools operated by defendant are segregated on the basis of race.

5. Racial segregation is most pronounced in the elementary schools of the District. Over 55% of the Black elementary school children attend schools with a Black enrollment of over 30%, while 74% of the White elementary school children attend schools with Black enrollments of less than 5%. There are 27 elementary schools which have a minority enrollment of less than 5%, while there are 13 elementary schools which have a minority enrollment of over 30%. Hay, Bethune, and Willard have minority enrollments of over 70%, Loring, Wenonah, Audubon, and Lake Harriet each have less than six minority students and Pillsbury has none.

6. At the junior high level, over 68% of the minority

junior high students attend schools with over 30% minority enrollments, while almost 63% of the White students attend junior high schools with less than 5% minority enrollment. Lincoln Junior High has over 72% minority enrollment, while Southwest Junior High has but five minority students.

7. Two Minneapolis high schools have minority enrollments of over 30% while four have minority enrollments of less than 4%.

8. The size and location of Bethune School, which was constructed in 1968, were intended to have the effect of continuing the pattern of racially segregated schools which had existed in Minneapolis since at least 1954. From its inception it was clear that the location of the school would cause it to have an extremely high Black enrollment. In fact, since its doors were opened, it has always been at least 50% Black. By constructing Bethune with a capacity of 900 instead of the 500-600 optimum which is generally used by the District, the defendant intentionally increased segregation. Building a school of that size on the near North side insured that most of the children in that predominantly Black area of the City would go to one school rather than spilling over into neighboring schools with larger majority enrollments. Indeed, the name itself is evidence of the defendant's intention that this was to be a Black school. It is hard to imagine how a school could be more clearly denominated a "Black school" unless the words themselves had been chiseled over the door.

9. The addition of seven new classrooms to the Field elementary school in 1964 had the intended effect of increasing racial segregation. Although Field, which at the



time was 40% Black, had more students (613) than any of the four surrounding predominantly White elementary schools (Northrup, 100 White, 370 pupils; Hale, 100% White, 609 pupils; Fuller, 100% White, 552 pupils; Page, 100% White, 304 pupils); nonetheless the defendant significantly increased its size. The effect was to maintain the high percentage of Blacks at Field, thus making it the identifiably "Black school" in south central Minneapolis while keeping Fuller, Hale, Northrup, and Page as "White schools." The District offered no alternative justification for its decision.

10. In 1967 an addition was added to Washburn High School. At the time Washburn was over-enrolled by some 600 students. At the same time, Central High School, which is adjacent to Washburn, was running at about 600 pupils below its rated capacity. Central had a Black enrollment of 23% while less than 3% of Washburn's students were Black. At no time during this period was any attempt made to alleviate the overcrowding at Washburn by moving the boundary between Washburn and Central. Instead, after pressure had been exerted by parents of Washburn pupils, the defendant built a major addition to Washburn which had the effect of increasing segregation in the Minneapolis Public Schools. The defendant advanced no reasons for justifications for this course of conduct. Therefore, when viewed along with other actions of the defendant, this Court views the addition at Washburn to have been racially motivated.

11. The defendant aided in increasing segregation in its schools by the location it chose for portable classrooms. In 1965 a portable classroom was erected at Field.

The effect was to further increase the segregation caused by the addition which had been completed in 1964. (See Finding 9, supra.) This was done in spite of the fact that Hale and Northrup schools, close by, were underenrolled. Likewise, portables were erected at Mann and Bancroft in 1968-69. Both schools had relatively high Black populations—29.1% and 26.1%, respectively. This was done despite the fact that there was room for more students at two adjacent schools—Corcoran (1.1% Black) and Standish (.2% Black). The defendant made no attempt to show any reasons why portables were used in these instances instead of merely changing boundaries.

12. The decisions of the defendant as to school size over the past fifteen years have also had the effect of increasing racial segregation. The pattern that emerges is that in areas where there were small White neighborhoods adjacent to large minority neighborhoods, abnormally small White elementary schools were constructed, while at the same time large Black elementary schools were maintained; the most recent and notable case concerns Page and Field schools. Page School was constructed in 1958 with a capacity of 300, this making it the fifth smallest school in the District. This compares with adjacent Field which has had an enrollment of over 600 until this year when it was paired with Hale. No explanation was given of why Page was designed to accomodate so few pupils. In light of the defendant's policy of building schools with capacities of 500-600, a school of such significant deviation on the perimeter of a minority area can only be seen as an attempt to further segregation.

Notable also is Bryn Mawr, third smallest elementary



school, which is adjacent to the largest elementary school—Harrison. An addition was constructed at Harrison in 1970 despite the availability of a larger site with a lower density of pupils at Bryn Mawr. Again, the defendant offered no alternative reason for its decision.

13. These decisions as to size and location of schools have had the intended effect of increasing or at least maintaining segregation in the defendant's schools.

14. In 1968 a boundary change was instituted between Washburn and Southwest High School. The change represented a decision by the defendant to transfer students from heavily overcrowded Washburn to Southwest, which was only slightly over capacity. This decision was made in spite of the fact that another adjacent high school, Central, was far below capacity. Both Southwest and Washburn are predominantly majority schools and Central has the highest percentage of minority students in the District. Viewed in this context and within the context of the defendant's general course of conduct, the Court views the boundary change to have been racially motivated, especially in light of the fact that no alternative reason for the change was presented at trial.

15. The defendant's policy of allowing special transfers from the school to which a student is assigned to another school upon the agreement of the principals of the two schools has also contributed to racial segregation. A member of the defendant's administration admitted that race was a major factor in many of these transfers. In addition, testimony at trial showed that administrators have informed parents of what "reasons" would be sufficient in order to have their child transferred. The fact

that the largest numbers of principal transfers occurred from such schools as Bryant, Lincoln, Central, North, Bancroft, and Willard—all of which have heavy concentrations of minority pupils—gives added weight to the conclusion that principals' transfers have been used by the defendant as a way of continuing and increasing segregation in its schools.

16. The Court finds that it has been the general course of conduct for the District to create optional attendance zones along the perimeters of minority neighborhoods. Often the intended effect of optional zones has been to allow White students to "escape" from schools with heavy minority enrollments to schools which are identifiably White.

17. There has never been a Black teacher, administrator, or other certificated employee assigned to Armatage, Barton, Fuller, Fulton, Hiawatha, Keewaydin, Lowry Prescott, Waite Park, or Wenonah elementary schools. The following schools have had but one Black teacher throughout their history: Bremer, Bryn Mawr, Burroughs, Cleveland, Cooper, McKinley and Webster elementary schools and Anthony Junior High. Lind, Holland, and Schiller elementary schools have had but two Black teachers.

The number of Black certificated personnel in the District has risen dramatically since 1966, due in large part to the efforts of Dr. Davis and the commitment of the Board of Education to integrate the faculty of the schools. However, the placement of the minority teachers once they have come into the system has been such that faculty segregation still exists. Sixty-one per cent of the Black elementary teachers are located in 14 elementary schools, each of which has over 15% Black enrollment. Forty-eight



per cent of the Black secondary certificated personnel are in the three secondary buildings which have over 30% Black students.

18. Another form of discriminatory teacher placement in the District relates to the race of the student rather than to the race of the teacher. That is the District's practice of assigning less experienced and lower paid teachers to schools with the highest percentage of minority students. For example, of 68 elementary schools the five with over 30% Black enrollment rank 44th, 52nd, 61st, 67th and 68th when ranked according to the average classroom teacher's salary. The two junior highs with over 30% Black enrollment rank 12th and 15th out of 15 in the same category. The one senior high with over 30% Black enrollment ranks 11th out of 11.

The average number of probationary teachers on the faculties of the five elementary schools with over 30% Black enrollment (36.3%) is significantly higher than the other elementary schools in the District (21.8%). Likewise, the same situation is present at the junior and senior high levels.

The average teacher in the elementary schools with over 30% Black enrollment is also at a much lower step than the average teacher in other schools in the District. The five schools with over 30% Black enrollment rank 49th, 54th, 62nd, 65th, and 68th when ranked with the other schools according to the average step of their teachers. Likewise, the two junior highs with more than 30% Black enrollment rank 11th and 15th out of 15 in a similar comparison, and Central High School ranks 11th out of 11 high schools.

19. The District's policy concerning transfer of teachers has also contributed to faculty segregation. Under this policy the teacher with the greatest amount of seniority who wishes to transfer to a given school receives preference over all other applicants for transfer. Since it is only in the last five years that extensive recruitment and hiring of minority teachers has occurred, it is obvious that most minority teachers are far down the seniority list. This makes it virtually impossible for a minority teacher to transfer to another school. The effect is thus: (1) many of the newest teachers are members of minority groups due to the District's increased recruitment; (2) many new teachers' first assignment is in schools with high proportions of minority students; therefore (3) many Black teachers who have little seniority are locked into minority schools, and have virtually no chance of transferring to "White schools." Such a policy obviously contributes to the segregated character of the Minneapolis faculty since it makes mobility from school to school very difficult for new teachers, many of whom happen to be Black.

20. The Minneapolis School Board asserts that it has a legal right to transfer any teacher to any school if it finds it to be necessary. The Board has seldom, if ever, used this power in the past, and it has never been used to achieve faculty integration.

21. After a teacher has been hired by the personnel department, he or she is interviewed by the principals of various schools where there are openings. The principal has an absolute veto over any teacher coming into his or her school. While written reasons must be given for a rejection of a teacher seeking to transfer to a new school,



apparently a principal need give no reasons for rejecting a new teacher in the District. It is obvious that a principal seeking to maintain an all White faculty at a majority school has little trouble in doing so. This policy has been partially responsible for the failure of the defendant to have an integrated faculty.

22. The defendant has made a conscientious effort to recruit Black administrators since Dr. Davis became superintendent in 1967. The number of Black administrators has increased from one when Dr. Davis began to a current high of 19. However the administrators, just like the teachers, are segregated insofar as the students are concerned. Of the 19 Black administrators, only four are in positions in schools which have under a 30% Black enrollment. The testimony of several Black administrators who formerly were employed by the defendant indicates that the policy of the District has been to place Black administrators in schools with high Black populations.

23. This assignment policy of both teachers and administrators is partially responsible for the fact that there are presently schools in the District which are identifiable by race.

24. The record indicates a high degree of residential segregation within the boundaries of the defendant School District. The near north side of the City and a large portion of south central Minneapolis contain heavy concentrations of minority groups. At the same time, the perimeter of the city is largely White.

25. Residential segregation in Minneapolis is in large part due to racial discrimination. Prior to 1962 it was

common practice for members of the Board of Realtors to only show minority persons houses in certain areas. Indeed, it was thought to be unethical to introduce minority residents into a neighborhood for the first time. Even after Federal legislation outlawing housing discrimination in 1962, sellers could declare their property to be exempt and thus they could make it unavailable for a minority purchaser.

While legislation and efforts by concerned realtors have made progress in the area of housing discrimination in Minneapolis, there is "still far to go." Indeed, the testimony reflects that Black families are still only shown houses within the "Black area" unless they make a concerted effort to see housing in other parts of the City.

26. The record clearly indicates that the defendant has been aware of the existence of residential segregation, and the discrimination which underlies it.

27. As result of the actions of the defendant set out above and the widespread racial segregation in housing within the District, the public school students of Special School District #1 have been segregated on account of race, and certain schools—Willard, Bethune, Harrison, Mann, Hay, Bryant, Lincoln, and Central—have been purposefully maintained as identifiably "Black schools."

28. Since the institution of this suit great strides have been made by the District as far as planning and preparation for a concerted effort to overcome the effects of past racial segregation. The Urban Transfer Program, an attempt at voluntary desegregation, the pairing of Field and Hale elementary schools in the fall of 1971, and the affirmative recruitment program suggest some effort, though minimal, to eliminate racial segregation.



29. Finally, the Court finds that the factor largely responsible for the defendant's failure to take significant affirmative action to alleviate the segregated condition of the schools has been public pressure not to integrate. School Board members themselves admitted that public pressure against desegregation/integration has influenced their decisions. A clear case in point is the delay, after vehement public objection, in the pairing of Field and Hale schools.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1343.

2. The Constitution absolutely prohibits segregation imposed by law. Conversely, it requires that the public school systems in this country be integrated.[1] *Brown v. Board of Education*, 347 U.S. 483 (1954).

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[1]There appears to have been some controversy over the exact meaning of the terms "desegregation" and "integration." Apparently, the words were used during the trial by various school administrators and the plaintiffs' expert in a sense different from the way they have been used by the Supreme Court and other lower Federal courts.

At trial "segregation" was defined as "merely the mixing of bodies," and thus was but a step on the road to "integration" which was defined as "the combination of different racial groups into one society."

Courts have used the two words interchangeably; there has never been a Supreme Court case in which the Court distinguished segregation from integration. Being mindful of the problems which can be caused by uncareful use of language, this Court has followed the traditional legal pattern and used the two words as if they were synonymous throughout the Findings, Conclusions and Order. See *United States v. Jefferson County Board of Education*, 372 F.2d 836, 846, n.5 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967).

3. This Court agrees with the Fifth Circuit that the *Brown* decision rests on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed. *United States v. Jefferson County Board of Education*, 372 F.2d 836, 871 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967).

4. The Constitution, and therefore its interpretation in *Brown*, applies equally to all public school systems regardless of whether segregation is imposed by statute as it has been in the south, or whether it is imposed covertly as it has been in the north and west. *Kelly v. Guinn*, No. 71-2332 (9th Cir. February 22, 1972); *Taylor v. Board of Education of City of New Rochelle*, 191 F. Supp. 181 (S.D. N.Y. 1961), *aff'd*, 294 F.2d 36 (2nd Cir. 1961).

5. The mandate of *Brown* has been clear. However, uncertainty has developed over what in fact constitutes "segregation imposed by law."[2] The uncertainty is due

[2]This uncertainty has developed due to the distinctions made by courts between "de facto" and "de jure" segregation. "De jure" school segregation is segregation imposed by law or by public policy pursued under color of law. On the other hand, school segregation is considered "de facto' when it results from pupil assignment policies not based on race, or other conditions for which government is not directly responsible. *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.C. D.C. 1967).

For purposes of this decision the Court has attempted not to use there terms since they are imprecise and have been used differently by different courts. It is clear that, as the terms have been used by most courts, "de facto" segregation clearly is present in Minneapolis. However, this decision is in no part based on findings of "de facto" segregation. It has been unnecessary to reach the question of whether "de facto" segregation is constitutionally prohibited here, since the defendant has acted in a manner which was intended to create and/or increase segregation, and thus "de jure" segregation also exists in Special School District #1.

Let it suffice to say that had it been necessary to have decided whether "de facto" segregation as it exists in Minneapolis was constitutionally prohibited, this Court would have ruled that it was.



in large part to the fact that the Supreme Court has specifically withheld decision on the question of whether school segregation caused by the implementation of a neighborhood school system on a district with racially segregated housing patterns is "segregation imposed by law."[3] Until this question is answered, no Court can be certain what the ultimate limits of the constitutional prohibition against segregation in education may be. However, it is beyond dispute that:

(a) if the State and/or the school administration has taken any action with a purpose to segregate, and

(b) if that action has had the effect of creating or aggravating segregation in the schools of the District, and

(c) if segregation currently exists, and

(d) if there is a causal connection between the acts of the school administration and the current condition of segregation,

then there is segregation which is imposed by law; and such is prohibited by the Fourteenth Amendment to the Constitution. *Keyes v. School District No. 1, Denver, Colorado*, 313 F. Supp. 61, 73 (1970).

6. It is violative of the Fourteenth Amendment for public school officials to make educational policy decisions which are based wholly or in part on considerations of the race of students or teachers, and which have the effect of increasing or aggravating racial segregation in

[3]*Swann v. Board of Education*, 402 U.S. 1, 23 (1971).

the public schools. *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *affirmed*, 389 U.S. 571 (1968); *Spangler v. Pasedena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970); *Taylor v. Board of Education of New Rochelle, supra.*

7. When school officials consistently draw attendance lines so as to increase or further aggravate racial segregation within their district, the presumption arises that they have done so in order to promote racial segregation. *Spangler v. Pasadena City Board of Education, supra; United States v. School District 151 of Cook County, Illinois*, 286 F. Supp. 786 (N.D. Ill. 1968). In the absence of an affirmative showing of justification for attendance lines other than racial ones, a court has no other choice than to conclude that racial considerations were the motivating factors.

8. Construction policies which create or aggravate racial segregation are an "important indicia of a segregated system." A pattern of school construction and/or abandonment is entitled to great weight in determining the existence of legally imposed school segregation. *Swann v. Board of Education*, 402 U.S. 1, 18 (1971); *Kelly v. Guinn, supra.*

9. When school officials vary the size of schools depending on the area of the district in which they are built, and when they allow some schools to become overenrolled while adjacent schools are substantially below capacity, in the absence of alternative justification, these actions must be presumed to be racially motivated if they have the effect of creating or intensifying racial segregation. *Davis v. School District of the City of Pontiac*, 309



F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971); *Spangler v. Pasadena City Board of Education, supra.*

10. No official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment. *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).

11. Where it is possible to identify a school as either "White" or "Black" by reference to the racial composition of its teachers, a prima facie case of violation of Fourteenth Amendment rights is shown. *Swann v. Board of Education, supra*, at 18; see *Green v. County School Board*, 391 U.S. 430, 435 (1968).

12. Teacher assignment is so clearly subject to the complete control of local authorities that the assignment of a large proportion of Black teachers to schools with the highest percentages of Black students is strong evidence that racial considerations have been permitted to influence the overall school policies and practices of the district. In the assignment of teachers there are no extrinsic factors such as residential segregation or natural barriers to transportation behind which a school district can hide in order to escape its constitutional duty to provide integrated schools for its pupils. *Kelly v. Guinn, supra; Davis v. School District of Pontiac, supra.*

13. In order to overcome the effects of its past discrimination in assigning teachers, a district has an obligation to allocate certificated and noncertificated personnel so that no school is identifiable by the composition of its faculty as being tailored for a heavy concentration of

either Black or White students. *U.S. v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Brewer v. City of Norfolk*, 397 F.2d 37 (4th Cir. 1968).

14. The responsibility for faculty and staff desegregation is that of the defendant, not the teachers. The achievement of desegregated faculties may not be made contingent upon the willingness of teachers to voluntarily transfer from their present schools. If necessary, a district must use its power to assign or reassign teachers in order to comply with the constitutional requirement. *United States v. Board of Education of City of Bessemer*, 396 F.2d 44 (5th Cir. 1968); *Monroe v. Commissioners of City of Jackson*, 380 F.2d 955 (6th Cir. 1967); *Kelly v. Altheimer*, 378 F.2d 483 (8th Cir. 1967).

15. A school district may not, consistent with the Fourteenth Amendment, maintain segregated schools because of, or permit educational choices to be influenced by, a policy of racial segregation in order to accomodate community sentiment or to appease the wishes of even a majority of the voters. *Cooper v. Aaron*, 358 U.S. 1, 15-16 (1958); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Monroe v. Board of Commissioners, supra; United States v. School District 151, supra; Spangler v. Pasadena City Board of Education, supra.*

16. As a matter of law, the intended and inevitable effect of a series of policy decisions made by the defendant Special School District #1, Minneapolis, Minnesota, with respect to size and location of schools, attendance zones, enrollment of various schools, transfer policies, and teacher assignments as described in the Findings of Fact



set out above has been to aggravate and increase the racial segregation in its schools. These policies have been especially offensive due to the defendant's knowledge of the extensive nature of housing segregation within its bounds. *Brown v. Board of Education, supra; Taylor v. Board of Education of City School District of City of New Rochelle, supra; Spangler v. Pasadena City Board of Education, supra; Davis v. School District of the City of Pontiac, supra; United States v. School District 151 of Cook County, Illinois, supra.*

## ORDER FOR JUDGMENT

This Court having fully considered the testimony and documents offered at trial, and the depositions and exhibits attached thereto, has concluded that it has been shown that there exists a condition of segregated schools in the City of Minneapolis, and that the intentional actions of the defendant herein are in part responsible for this condition.

IT IS THEREFORE ORDERED that the defendant, its school board, its administrators, its employees, its agents, and all those who are in active concert or participation with them, are hereby permanently enjoined from discriminating on the basis of race or national origin in the operation of Special School District #1 or any successor district or districts which may be formed therefrom. Such injunction is directed particularly at, but not limited to, the discrimination in assignment of students *and* teachers within the District. As is set out more completely below, the defendant shall take affirmative action to disestablish school segregation and eliminate the effects of

its prior unlawful activities. That which shall constitute *minimal* compliance with this Order is as follows:

1. The defendant will proceed to implement its Plan for Desegregation/Integration as adopted with four amendments by the School Board on April 25, 1972. The Court is greatly impressed by the obvious amount of consideration and preparation which went into this Plan. Its attention to staff development and human relations training is laudable and should, if anything, be stressed more strenuously. This Court is of the opinion that the Plan presented by the defendant meets constitutional requirements, except for those areas indicated below.

In accepting the District's plan, the Court is in effect rejecting most of the changes suggested by the plaintiffs' expert. This is no reflection upon him. He appeared to be objective, fair, and reasonable. However, this Court agrees with Judge Eisele that if the District's plan meets constitutional requirements a court need look no further. "It is for the school board not the courts to establish educational policy." *Yarbrough v. Hulbert-West Memphis* District No. 4, 329 F. Supp. 1059, 1064 (E.D. Ark. 1971). This is especially true when the defendant appears to be exercising good faith. The preparation of a plan of this quality in the face of this lawsuit indicates that this defendant is not a recalcitrant district whose promises are suspect.

2. The defendant's plan shall be modified in the following manner:

(a) Under the District's Plan, Bethune, new Webster, and Willard elementary schools, and the elementary schools in the Hay, Penn, Loring pairing would have minority enrollments of close to or over 40%. In light of the minority population of the District and the racial composition of other schools therein, the Court feels these percentages are too high. Therefore, the Plan should be modified so that no more than 35% of the student body of any one school consists of minority children.



This is not to say that the Constitution requires a fixed racial balance in public schools. The Court only uses the figure as a "useful starting point in shaping a remedy for past constitutional violations." *Swann v. Board of Education, supra,* at 25. This is a very limited use of a mathematical ratio since it will only affect five of the defendant's 94 schools. This is clearly within the equitable discretion of the Court. *Swann v. Board of Education, supra; Kelly v. Guinn, supra.*

(b) The District's Plan is also insufficient in that it does not go far enough in providing for faculty integration. Therefore, the defendant shall comply with the following formula suggested by Dr. Stolee. Before there are more than two minority teachers in any one elementary school, there shall be at least one minority teacher in all elementary schools. For these purposes, principals and assistant principals shall be considered teachers. The faculties of the secondary schools shall be integrated so that each has approximately the same proportion of minority to majority teachers as there are minority to majority teachers in the whole system.

While the Court is convinced that there are sound reasons of educational policy for delaying final implementation of defendant's Plan until the 1974-75 school year, it can see no similar justification for delay of faculty integration. Therefore this Plan for faculty intergration shall be fully completed by the opening of the 1973-74 school year. Every effort should be made to complete one-third of the changes necessary to achieve this result by the beginning of the 1972-73 school year.

3. The District shall not allow any transfers by principal's agreement or otherwise which have the effect of increasing the segregated nature of either the sending or receiving schools. *United States v. Board of Education, Independent School District No. 1, Tulsa, Oklahoma,* 429 F.2d 1253 (10th Cir. 1970).

4. Any construction of new schools or additions to old schools beyond what is contemplated in the Plan shall be submitted to the Court for approval. It is not anticipated that any plans which would have the effect of increasing current segregation would be approved. *U.S. v. Board of Public Instruction, Polk County, Fla.,* 395 F. 2d 66 (5th Cir. 1968).

5. Before any changes may be made in the District's Plan for Desegregation/Integration which will have the effect of increasing or aggravating the existing segregation in defendant's schools or which will in any way delay full implementation of the Plan, the changes must be approved by this Court.

6. Periodic reports shall be made by the defendant every six months until ordered otherwise by the Court.



Such reports shall indicate the number of students and teachers by race for each school in the District. They shall also advise specifically of what steps have been taken toward implementing the Plan, and indicate any place where the timetable of the Plan is not on schedule. The reports shall be filed by the 31st of December and the 1st of July each year, commencing December 31, 1972. A copy of the report shall be presented to plaintiffs' counsel at the time it is filed with the Court, and his comments will be seriously considered.

IT IS SO ORDERED.

May 24, 1972.

/s/ EARL R. LARSON
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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JEANETTE BOOKER, et al,

Plaintiffs,

vs.

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, et al,

Defendants and Third Party Plaintiffs,

vs.

THE HOUSING AND REDEVELOPMENT AUTHORITY IN AND FOR THE CITY OF MINNEAPOLIS; CARLA HILLS, Secretary of the United States Department of Housing and Urban Development, et al,

Third Party Defendants.

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## MEMORANDUM ORDER

No. 4-71-Civ. 382

(Date Entered: May 22, 1978)

The defendant School Board has submitted its Tenth Semi-Annual Report on desegregation in the Minneapolis schools as required by this Court's Order of May 24, 1972. The Court now has before it defendants' motions to terminate the litigation or, in the alternative, to modify previous Court orders relating to the desegregation of the student population of the district. Plaintiffs, representatives of a class of all school children in the district, oppose both motions. A hearing has been held and hundreds of pages of documents and exhibits have been submitted, which the Court has examined with care. Some preliminary discussion of the background of this case is in order before turning to the merits.

In May 1972, this Court found that defendants, through decisions on the size and location of schools, attendance zones, enrollment policies, transfer policies, and teacher assignments, had acted intentionally to maintain or increase racial segregation in its schools. The Court ordered implementation of the district's own Desegregation/Integration (D/I) plan with certain modifications, one of which was a 35% limitation upon the proportion of minority students in any one school. The D/I plan was akin to a "step at a time" plan. Faculty integration was to be accomplished by the opening of the 1973-74 school year, whereas integration of the student body was to be completed by the 1974-75 school year. The district was ordered to submit semi-annual reports to the Court. *Findings of Fact, Conclusions of Law, and Order for Judgment*, May 24, 1972 (hereafter *Findings*).[1]



Various changes were made in the D/I plan over the years to reflect changing conditions or to correct portions of the plan that proved unsuccessful. In May 1975 the percentage limitation on minority pupils in any one school was raised to permit not more than 42% of all minorities at one school and not more than 35% of any one minority. *Memorandum Order*, May 7, 1975. By July 1977 the School Board had fully complied with the Court's 1972 Order, as modified, with the exception of balancing the racial makeup of the student body at a number of schools. The district has never been in full compliance at any one time with that portion of the Court's orders. In July the Court rejected the School Board's motion to terminate jurisdiction and ordered full compliance with the 35/42 guidelines by the fall of 1978. *Memorandum and Order*, July 11, 1977.[2] On August 5, 1977, defendants moved to vacate the July Order and the Court denied the motion. *Order*, August 8, 1977. No appeals have ever been taken from any of the orders of the Court.

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[1]The 1972 opinion is published at 351 F. Supp. 799 (D. Minn. 1972).

[2]The principal ground urged for termination of jurisdiction was *Pasadena v. Spangler*, 427 U.S. 424 (1975), in which the Supreme Court held that once a school district had achieved compliance with a court-ordered plan, it was an abuse of discretion for the court to retain jurisdiction indefinitely for the purpose of requiring yearly redistribution of the pupil population in light of demographic changes in the city. This Court denied defendants' motion on the ground that in this case no identifiable point of total compliance with the Court's orders exists; unlike the Pasadena Plan, the Minneapolis plan is and has been from the beginning akin to a "step at a time" plan which the Supreme Court specifically excluded from the application of *Pasadena*. Where implementation of a unitary system is a gradual process, plans can only be judged in the context of changing circumstances and the district's success or failure to plan ahead and allow for foreseeable trends. Thus, *Pasadena* is not at issue here.

I. Res Judicata.

Plaintiffs oppose defendants' motions on the ground that they are barred by res judicata. Plaintiffs contend that the July 1977 Order was a final judgment from which defendants could have appealed and that they should not now be permitted to reopen issues previously decided. Although there is some force to plaintiffs' contentions, supervision of an equitable decree requires continued willingness by the Court to inquire whether changing circumstances of fact or law mandate modification of its prior orders. *Pasadena v. Spangler,* 427 U.S. 424, 437 (1975). The Court is therefore of the view that defendants' motions should be reviewed on the merits to determine whether defendants have raised issues that may require changes in the Court's orders.

II. Motion to Terminate Jurisdiction.

Defendants' major argument on their motion to terminate jurisdiction stems from *Dayton v. Brinkman,* 97 S.Ct. 2766 (1977). In that case the Supreme Court vacated a Court of Appeals decision approving a district court remedy for racial segregation in the schools of Dayton, Ohio. The district court in 1972 had found three separate indicia of violations of the Equal Protection Clause: (1) the pupil population in the Dayton schools was racially imbalanced; (2) use of optional attendance zones for three high schools had "demonstrable racial effects" and (3) the School Board has rescinded resolutions passed by the previous board which had acknowledged a role played by the Board in creating segregative patterns of school attendance. The district court originally ordered a limited



remedy to correct the violations found, but the Court of Appeals, after two reversals of the district court, in effect imposed a remedy that would require elimination of systemwide patterns of one race schools in the district.

The Supreme Court held that the mandated remedy could not stand in light of the limited violations found by the district court. It remanded to the district court for reconsideration of whether violations had occurred in light of *Washington v. Davis,* 426 U.S. 229 (1976), and, if so, formulation of an appropriately tailored remedy. In relation to the latter, the Court said:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Dayton v. Brinkman, supra,* at 2775.

Viewing *Dayton* in context, the Court does not perceive it as a statement of particularly novel legal principles for school desegregation cases. The three limited violations were simply not sufficient to support the comprehensive systemwide busing order imposed by the district court in response to the Court of Appeals. The Supreme Court reiterated and applied in a particular fact situation the long-established principle that a court's equitable discre-

tion to fashion a remedy for constitutional wrongs is not plenary and is limited by the scope of the wrongs themselves. *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Hills v. Gautreaux,* 425 U.S. 284 (1176); *Milliken v. Bradley,* 418 U.S. 717 (1974 In this light, *Dayton* appears to have little application to the motion to terminate jurisdiction here; but defendants have placed such emphasis upon the case that the Court deems it necessary to examine their views with some care.

Defendants attribute considerable importance to the portion of *Dayton* quoted above and conclude that the Supreme Court's directions apply not only to the initial formulation of a remedy but also to the question of terminating jurisdiction in an on-going suit. They ascribe to the language both a qualitative and a quantitative meaning. In quantitative terms, defendants argue, *Dayton* requires that desegregation remedies involving pupil redistribution be designed to achieve the numerical "amount" of desegregation that would have occurred absent constitutional violations; therefore, they urge, it can also be applied to determine whether a long standing partially implemented court ordered remedy has "worked."

This view requires use of what may be termed an "alternate universe theory," *see Brinkman v. Gilligan,* on remand, No. C-3-75-304, filed December 15, 1977, since a remedy's "success" is to be measured against a hypothetical condition. Defendants suggest that district courts are to receive statistical evidence depicting an "alternate universe" where no violations occurred, to compare that hypothetical data with what in fact exists, and to fashion a remedy designed to correct any discrepancy



between the hypothetical and the actual facts, and that alone. Similarly, jurisdiction should be terminated when that discrepancy has been corrected.

To that end, defendants have submitted numerous statistical projections setting out the present minority population of certain schools specifically mentioned in the May 1972 Order and hypothetical figures purporting to show what the present minority populations would have been in those schools absent any violations. In each case, the actual figures are lower than the hypothetical figures.[3] From this defendants conclude that the "incremental segregative effect" has been erased. In other words, the hypothetical minority population of a particular school is regarded as the norm and so long as the present population is less than that norm, the discrepancy created by the constitutional violations presumably has been cured.

The Court doubts that the Supreme Court intended *Dayton* to be quantified in precisely this manner. But even assuming the validity of defendants' view, their attempted application of it is fraught with difficulties. The hypothetical figures representing "what would have happened" are based on numerous retrospective assumptions of questionable soundness. For example, this Court found in 1972 that the use of portable classrooms at Mann and Bancroft in 1968-69 increased segregation in those schools, *Findings,* ¶ 11; the district offered no explanation for why the portables were used rather than using

[3]The schools defendants have used are Bancroft, Mann, Field, Bethune, Harrison, and Central High School. *See Findings* ¶¶ 11, 9, 8, 12, 10 and 14. Actual minority populations for 1977-78 are lower than the hypothetical projected populations by percentages ranging from 6.42 to 50.87. Other schools the Court originally specifically noted as identifiably black were Lincoln, Willard, Bryant, and Hay, for which hypothetical figures could not be calculated.

boundary changes. In attempting to project what would have occurred absent these violations, defendants' affiant now postulates a neutral non-segregative reason for the portables' use: accomodating increased enrollment from nearby Warrington school which closed in 1966. The hypothetical boundaries for Mann and Bancroft are then drawn assuming the boundaries would have remained the same as they were before Warrington closed, and the minority population of both schools is projected to the present based on those boundaries. This, of course, fails to account for what would have happened to the children at Warrington; apparently, the assumption is that Warrington would never have closed, even though the reasons for its closing were purportedly neutral. Thus the hypothetical "facts" depend first upon a belated neutral justification for heretofore unexplained discriminatory events and then upon an assumption that a neutral event—the closing of Warrington—would not have occurred. Similar problems attend the other projections—all are based on the affiant's judgment as to why the discriminatory act occurred, a guess as to what might have happened had it not occurred, a tendency to erase from the hypothetical not only the discriminatory act but other historical events as well, and a failure to account for the repercussions of such changes.[4] The limitations of a method based upon such data are self-evident. If anything, the hypotheticals illustrate the futility of attempting to assess the schools on anything other than a systemwide basis, for events at one school profoundly affected events at another.

[4]More fundamentally, of course, the hypotheticals fail completely to consider the interrelationship of schools and housing patterns. *Keyes v. School District No. 1*, 413 U.S. 189, 202 (1973); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 20-21 (1971).



er. And no figures have generated, nor can be, to show what the Minneapolis school system as a whole would have looked like today had the historical pattern of unconstitutional conduct not occurred.

Defendants acknowledge the limited utility of the figures since they cannot be generated for the whole school system.[5] They nevertheless urge that "incremental segregative effect" can be determined "qualitatively" in this case by assessing not only the available figures but also

[5]Defendants claim their hypothetical figures are primarily designed to show whether specific discriminatory acts in specific schools have been remedied. But they also suggest that the "range of incremental segregative effect" in these six schools can be useful in determining whether the minority population in other schools has been reduced by the appropriate amount. This "range," although it is not clearly explained, is apparently represented by the minimum and maximum percentage points by which the actual minority populations in any of the schools exceeded the hypothetical populations at any point in time. Thus, at Bethune in 1971-72, the actual minority population was only 0.66% above the hypothetical population; this is lowest discrepancy among all the figures for all the schools; at Harrison in 1973-74, the actual minority population exceeded the hypothetical by 14.42%, the highest found discrepancy. The "range of incremental segregative effect" is apparently therefore 0.66 to 14.42 percent. Defendants' argument appears to be that if, due to the desegregation plan, minority percentages at other previously identifiably black schools have been reduced since 1971 by 0.66 to 14.42 percent, or more, the constitutional mandate to desegregate the schools has been fulfilled. This appears to carry *Dayton* far beyond acceptable limits of abstraction, but again accepting this view for the purposes of discussion, the "ranges" can only be as accurate as the hypotheticals upon which they are based, and the Court finds the hypotheticals for the six schools unreliable in the first instance.

This Court need not decide how the language from *Dayton* should generally be applied in order to conclude that defendants have failed to demonstrate its relevance to this motion. *See* discussion accompanying notes 3-4, *supra*, and discussion accompanying notes 5, 6, *infra*. But the many problems of the statistical approach defendants have used reinforces this Court's view that *Dayton* cannot be interpreted so "mathematically." As another court has remarked, no court in any school case will ever be able to say with any assurance "where people would have lived, where schools would have been located [or] how much integration would have obtained" absent officially imposed discrimination. *U.S. v. Columbus Municipal Separate School Dist.*, 558 F.2d 228, 231 n. 11 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 728 (1978).

the district's general progress and commitment to desegregation. In effect, this view appears to require a determination that the remedies imposed were too broad in the first instance and that the district's noncompliance with court orders should therefore be excused and the case ended. The Court sees nothing in *Dayton* to warrant such an analysis. The remedies imposed in this case have been formulated with the understanding that remedies must be tailored to the wrong and have been proper in all respects.

Indeed, at bottom, there is an inherent contradiction in attempting to apply either of defendants' views of *Dayton* to a systemic school segregation case. This Court's findings of a systemwide pattern of discrimination in the Minneapolis schools cannot now be challenged or relitigated[6] and *Dayton* itself reemphasized that once systemwide impact is found, a systemwide remedy must be imposed. *Dayton* did not overrule the cases which have guided the district courts in formulating systemwide remedies—the goal is to desegregate the entire system "root and

[6]Certain portions of defendants' briefs and affidavits appear to be addressed to the issue of what proof is required to make out an Equal Protection Clause violation. Defendants cite and discuss numerous recent Supreme Court cases defining the intent element of unconstitutional discrimination, *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Austin Independent School District v. United States*, 429 U.S. 990 (1976), and, as already noted, some of the affidavits suggest neutral justifications for the actions originally found by this Court to be intentionally segregative. The Court presumes these discussions are intended merely as background for the questions at issue here and has so treated them. In order to avoid possible ambiguity, however, the Court notes that it is inappropriate at this stage of the litigation to re-examine the validity of the unchallenged May 1972 findings, which the Court views in any event as wholly consistent with recent caselaw, or to give any weight to "new" evidence purporting to explain certain School Board acts left unexplained six years ago, except insofar as that evidence relates to the validity of defendants' statistical proofs. *See* text accompanying notes 3-4, *supra*.



branch," *Keyes v. School District No. 1*, 413 U.S. 189, 213 (1973), *quoting Green v. County School Board*, 391 U.S. 430, 438 (1968), and to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation," *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971). *See U.S. v. Columbus Municipal Separate School Dist.*, 558 F.2d 228, 230-31 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 728 (1978). The concept of "incremental segregative effect," however it may be interpreted or applied when a district court is faced in the first instance with isolated unconstitutional acts, has little application where the segregative effect has already been determined to have been pervasive and to require a systemwide remedy. Since full implementation of desegregation plans here has not occurred, the Court cannot say that the goal has yet been reached. In sum, neither defendants' statistical evidence nor any other demonstrated application of *Dayton* mandates or even supports immediate termination of jurisdiction in this case.

## IV. Motion to Modify.

The 1977 Sight Count submitted by defendants shows that 16 schools are out of compliance with the 35/42 guidelines. Four schools have total minority populations of over 50% and three schools have total minority populations of over 47%. Ten of the 16 schools are out of compliance with the 35% figure for single minority popula-

tions. Of the 16 schools, seven were also out of compliance in July 1977.[7]

The defendants have requested modifications of the 35/42 guidelines in light of the results of the 1977 Sight Count, the number of schools out of compliance, the growing minority student population, declining school enrollments, and projections for the future. Defendants request a change of the guidelines to 50%, eliminating the percentage figure for a single minority and allowance of a variance of up to 60% for schools with heavy concentrations of Native American students.[8]

Mindful of the need for flexibility, the Court has never regarded the percentage figures as rigid requirements. Practicalities, such as the steadily increasing minority pupil population, have been taken into account. In 1975 the guidelines were changed in response to that problem and

[7]The schools are:

| | | |
|---|---|---|
| Andersen A | 51.78 | (35.50) |
| Anderson C | 51.44 | |
| Hall | 51.32 | (35.09) |
| Andersen B | 50.44 | |
| Wilder C | 45.38 | |
| Wilder B | 45.02 | |
| Bethune | 44.42 | (40.77) |
| North Star Intermediate | 44.41 | |
| Wilder A | 44.36 | |
| Andersen D | 42.65 | (35.29) |
| Willard | 42.38 | (38.81) |
| Penn Loring | | (37.74) |
| Bremer | | (36.13) |
| North | 48.07 | (41.63) |
| Jordan | 47.74 | (42.31) |
| Franklin | 47.15 | (37.83) |

Figures in parenthesis represent single minority enrollments. Of these schools, Willard, Jordan, North, Hall, North Star, Loring and Andersen were mentioned in the Court's Order as out of compliance in July 1977.

[8]Where Native American students comprised 30% of the school population, the overall minority population would be permitted to rise to 60%. Where Native American students comprised 15% of the school population, the overall minority population would be permitted to rise to 55% .



essentially the same issue is before the Court again, for the minority population is now 24.4% and is expected to reach approximately 26% by the fall of 1979. School enrollments number 49,306, reflecting a large drop from several years ago. Strict compliance with the 35/42 guidelines may therefore be impracticable in some schools.

There is thus a reasonable basis, as there was in 1975, for changing the pupil distribution guidelines. The Court is hesitant, however, in light of its experience with this case, to do so. Perhaps the major difficulty with gradual implementation of desegregation remedies is the tendency for planners to fail to take into account predictable demographic trends and inevitable errors in projections, sight counts, and other similar factors. Unless allowances for such errors are built into the system, noncompliance is virtually assured even where the district acts in good faith. The Court is then placed in the position of ruling on modification requests based on factors that ought properly to have been foreseen by the planners in the first place. Although the response to such requests must be flexible and reasonable where the mistakes do not appear to have been motivated by bad faith, this pattern threatens to so weaken the effectiveness of a remedy that at some point it can no longer be tolerated. Perhaps, despite repeated admonitions by the Court,[9] the district has never

[9]*See Memorandum Order for Supplemental Relief*, May 8, 1973, at 2; *Memorandum Order*, May 5, 1975, at 6 ("With the likelihood of an increasing minority student population in the Andersen attendance area in coming years, plans for maintaining minority enrollments within the revised limits should be undertaken now"); *Memorandum and Order*, July 11, 1977 ("The Court is constrained to point out . . . that to some extent the demographic trends in the City of Minneapolis should have been taken into account in planning school assignments, for the District had to have been on notice that Minneapolis would not be untouched by the nationwide trend toward increasing minority concentration in the city core.").

fully understood its responsibility to exercise reasonable foresight and to plan by allowing a generous margin for the errors and trends which, given its considerable experience, the district can readily anticipate. Unless and until the district acknowledges that responsibility, relief for the victims of unconstitutional discrimination will never be fully realized. Only because the Court is convinced that a slight modification of the guidelines at this time will not unduly erode their effectiveness and because the district has generally made good progress will the Court once more permit a change. But the district is hereby on notice that in the future neither the plea of "increased minority enrollment" nor of other foreseeable and predictable events will be deemed sufficient to support a modification request or to further delay final implementation.[10]

The district has requested that the guidelines be changed to 50% on the theory that a school equally balanced between majority and minority students cannot be deemed a segregated or one race school. As the Supreme Court has noted, however, what is deemed a one-race or segregated school depends heavily on the peculiar characteristics of the district involved. *Keyes, supra,* at 196. The Court finds that a 50% limit for the Minneapolis school system is simply too high, particularly when the School Boards plan would lift the limit for a single minority. It is difficult to conceive, for example, how Bethune or Willard with 50% black student populations could possibly be anything other than "black" schools in

[10]Neither the fact that minority enrollments would increase or that total enrollments would drop can be considered unforeseeable. The minority pupil population has increased at a steady one to two percent rate since 1968. Enrollment decline has also been relatively steady.



light of the history of this school system.[11] Moreover, because the guidelines have always been a maximum limit for minority enrollments, a number of schools have been permitted to remain virtually all white;[12] in that context, a 50% minority school is not the "neutral" school defendants envision. In the past, the Court has set the guidelines at approximately 20% above the projected total minority pupil population, a margin more generous than the 15% figure which plaintiffs expert testified is often used in desegregation cases, and it will follow that same procedure again. The percentage of a single minority figure shall likewise be raised by 4%.[13]

[11]Willard has never been in strict compliance with desegregation orders. In 1972, it had a minority enrollment of over 70%, as it did in 1973. In 1974 it was very close to compliance with the 35% guidelines with a minority enrollment of 35.74%. In May 1975 the guidelines were revised to 35/42 to give the district more leeway—and in the fall of 1975 and 1976, Willard was out of compliance with black enrollments of 37.21% and 40.79%, respectively; the total minority enrollment in 1976 was 43%. By the fall of 1977 improvements had been made, but compliance was still not achieved—the black enrollment was 38.81% and the total minority enrollment was 42.38%.

Similarly Bethune, also a heavily black school in 1972, was in compliance in 1975 after the guidelines were revised. In 1976 it was one of the schools in "ephermeral" compliance with ratios of 35.55/39.26 which by fall 1977 were 40.77/44.42. As the Court said of Bethune in 1975, "That school is a constant reminder of the segregationist policy of the District in the 1960's. The injury resulting from that policy has never been adequately remedied." *Memorandum Order,* May 7, 1975, at 4-5.

[12]According to the 1977 Sight Count six schools have less than 5% minority students; 20 schools have less than 10% minority students. Elimination of racial imbalance in these schools has not been considered necessary to the implementation of an adequate remedy in light of the practicalities of the situation; the fact that they have been permitted to continue is relevant, however, to assessing what must be considered a "minority" school in this district and also indicates the necessity for insistence upon strict compliance with the maximum limits.

[13]The largest single minority in the district is the black population. In 1976 when the guidelines were at 35/42, blacks comprised 15.2% of the student population. In 1977 blacks comprised 16.4% of the population, but it can be expected that by the fall of 1978 that percentage will rise to about 17.6.

The 39/46 guidelines must be complied with in the fall of 1978. It should be eminently clear to defendants that in order to comply they must aim to bring the minority population to less than 39/46 in every school or they risk repetition of the same problems experienced in the past and will have to assume the task of curing their errors without the assistance of any further leeway from this Court. The Court notes again, as it has in the past, that the district is in an ideal position to meet these goals for, as testimony at the hearing indicated, school closings and increased transportation are necessary in light of declining enrollments wholly apart from the operation of a desegregation plan. Finally, in light of the concerns expressed above and the Court's experience with the instability and potential unreliability of sight counts, full compliance will not be deemed to have occurred unless the same 39/46 limits are also met in the fall of 1979.

Three other points should be specifically addressed. The Court conditionally approved the H.E.N. program at North High and will permit it to continue so long as the minority enrollment figures, as determined by taking into account the H.E.N. students, remain at or below the 39/46 limits. The district has been cautioned, and is cautioned again, to ensure that the programs offered through H.E.N. are sufficiently attractive to keep North in compliance.

Second, the Court was most impressed by the voluntary efforts of parent groups to devise Plan A for the North area and appreciates the deep concern and good faith expressed by these citizens. Voluntary efforts are to be commended, but unfortunately they have insufficient guarantees of success to be relied upon at this stage of this litigation. Nevertheless the spirit of cooperation evi-



denced in these proposals could do much to ease further implementation of desegregation plans, and it is hoped such efforts will continue.

Third, the Court must also take note of the special variance proposed for Native American pupils in the board's 50/50 plan. The Court is sensitive to the concerns of the School Board and amici that the special educational needs of Native American students be met and that concentration of pupils may be helpful to the expenditure of Title IV funds, *see* 20 U.S.C. §§ 241aa, 887c, 1211a. But the constitutionality of permitting a school board to maintain, increase, or cause the segregation of Native Americans in the context of an urban school desegregation case is highly doubtful. Defendants and amici, representing several concerned Indian groups, assert that there is no constitutional bar to such actions because the classification of Native Americans is "political" rather than "racial." The difficult questions of constitutional law raised by this argument need not be definitively resolved in light of the Court's disposition of this matter, see discussion below, but they merit attention.

The theory that classifications of Native Americans in this context is permissible derives from the unique status of Indians arising out of their trust relationship with the Federal government and their tribal quasi-sovereignty. It is drawn largely from *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court upheld the Indian employment preference practiced by the Bureau of Indian Affairs. In rejecting the argument that the law was racially discriminatory, the Court stated it was applied to Indians not as a discrete racial group but as members of quasi-sovereign tribal entities whose activities were gov-

erned by the BIA in a unique fashion. *Id.* at 554. The Court noted:

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations.
> * * *
> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgment will not be disturbed." *Id.* at 552, 555.

The Court has followed the same rationale in subsequent cases. *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976); *Fisher v. District Court,* 424 U.S. 382 (1976); *United States v. Antelope,* 97 S.Ct. 1395 (1977).

Amici and defendants point out several Federal statutes that are directed toward providing special educational aid to Native American children on a per capita basis and to fostering parental involvement in such programs. *See e.g.,* 20 U.S.C. § 240, *et seq.* Amici also cite *Lau v. Nichols,* 414 U.S. 563 (1975), which held that minority students are entitled under the Civil Rights Act of 1964, 42 U.S.C. §2000d, to a meaningful education and that schools may have to provide services uniquely suited to their needs in order to fulfill that obligation. They conclude that the obligations of the Federal government to the Indians and the right to a meaningful education are best served by concentrating Native American students in



one or a limited number of schools and this treatment is therefore constitutionally justified.

There is, however, an important distinction between the Supreme Court cases cited and the situation here. The Supreme Court has not held that laws applying only to Indians are never to be deemed "racial" classifications, the laws or practices in question were closely related to furthering the federally recognized interests of political sovereignty and tribal self-government and the classifications consequently depended on tribal membership or proximity to reservations. As one authority has expressed it, "From one perspective [such laws] are not racial classifications; rather they refer to particular groups defined in political or geological terms." Rosenfelt, *Indian Schools and Community Control,* 25 *Stan. L. Rev.* 489, 531-32 (1973).[14] Here, the School Board's proposal has nothing to do with tribal membership or any quasi-sovereign interests of particular tribal groups or reservations. The classification can only be deemed to be "directed toward a racial group consisting of 'Indians'." *Mancari, supra,* at 553 n.24.[15]

As a racial classification, the proposed variance would normally be subject to strict scrutiny under the Equal Protection clause and could be justified only by a

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[14]The Supreme Court advanced the same theory in *Mancari:*

> "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, preference is political rather than racial in nature." *Mancari, supra,* at 553 n.24.

[15]Thus, the Court does not have before it and expresses no view on issues relating to the State creation of "Indian school districts," where considerations of sovereignty and self-government of a particular tribe or tribes are involved, where district boundaries are drawn coterminous with reservation boundaries, or where considerations of geography pose vast problems of social dislocation unless racially imbalanced districts are permitted. *See* Rosenfelt, *supra,* at 544-50.

compelling State interest, here, the interest in meeting the special needs of Native American children. The Court agrees that meeting the needs of these students is extremely important, but according to the testimony of defendants' witnesses, these needs have been and can be met by means other than promoting segregation in several schools. The School Board has done a commendable job of serving Native American pupils at both Andersen and Wilder, where the concentrations of Native American students are high, and at Sheridan where the concentration is low. Moreover, no showing has been made that the operation of a desegregation plan will so disperse and isolate Native American pupils that the provision of special services becomes wholly infeasible;[16] a concentration of up to 39% at any one school should be more than sufficient to assure continuing provision of appropriate services—indeed, the concentration at Andersen, which defendants' witnesses viewed as a model, is presently at approximately 35%. The Court does not mean to imply that the district has by any means "solved" the deep and complex problems of educating Native American children to realize their full potential; but the district has demonstrated that promising approaches can be found in the context of an integrated unitary school system.

[16]Amici used the situation in Milwaukee as support for their argument. There 250 Indian students were scattered as a consequence of busing from four schools, with special Indian Education Act programs, to 11 schools. In reliance on a paragraph of a court desegregation order which permitted assigning children to schools that met their special needs, so long as the assignments were consistent with other requirements of the order, apparently including racial balance requirements, *Armstrong v. O'Connell*, 427 F. Supp. 1377 (E.D. Wis. 1977), the district returned Indian children to the four schools. That is obviously quite a different sitaution than requesting certain schools be permitted to become 60% minority schools because many Indian children attend them. The Minneapolis situation is also quite different in terms of real numbers; over 500 Indian children attend Andersen and nearly 200 attend Wilder.



Thus, under the compelling State interest test, the proposed variance could not stand. Perhaps an argument could be made, although it has not been advanced, that even assuming this is a racial classification, some less rigid standard of review than strict scrutiny could properly be applied because it is, at least at the present time, purportedly benign.[17] As the Court has noted, however, it need not definitively resolve constitutional questions in order to decide the specific issue here. Equitable principles govern the administration of the remedy stages of this suit. The proposed variance would affect not only Native American students but would also impinge upon the rights of other minority plaintiffs who would be attending the 60% or 55% minority schools. Furthermore, exceptions for some schools necessarily affect other public schools within the planning area. In light of these factors, and the factors discussed in the preceding paragraph, it is well within the Courts discretion to reject the proposal and the Court does so on those grounds.

IT IS THEREFORE ORDERED THAT:

1. Plaintiffs' motion to strike from evidence numerous documents and exhibits received at and before the hearing is denied.

2. Defendants' motion to terminate jurisdiction is denied.

[17]One commentator suggests that with regard to federally created Indian schools "A less rigid standard of review would apply if it could be shown with some certainty that the maintenance of an identifiable racial school conferred a benefit on Indian children." Rosenfelt, *supra*, at 539. He does not, however, indicato what judicially manageable standards could be used to determine "benefit" and notes that the record of segregated BIA schools is so seriously in question as to trigger strict scrutiny. *Id.* at 540, 541 n.305.

3. Defendants' motion to modify previous orders is granted to the extent of changing the pupil guidelines to not more than 39% at any single minority and 46% total minority population at any school. These guidelines must be met in the fall of 1978 and in the fall of 1979.

May 22, 1978.

/s/ EARL R. LARSON
United States Senior District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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JEANETTE BOOKER, et al,

Plaintiffs,

vs.

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, et al,

Defendants and Third Party Plaintiffs,

vs.

THE HOUSING AND REDEVELOPMENT AUTHORITY IN AND FOR THE CITY OF MINNEAPOLIS, ET AL,

Third Party Defendants.

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MEMORANDUM ORDER

No. 4-71-Civ. 382

(Date Entered: June 23, 1978)

Defendants have moved for a stay of this Court's injunction of May 22, 1978, under Fed. R. Civ. Proc. 62.



A party seeking such a stay must show it is very likely to succeed on the merits of the appeal; it will be irreparably harmed if a stay is not granted; other parties will not be substantially harmed if a stay is granted; and that a stay will not harm the public interest. *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1076-77 (8th Cir.), *app. to vacate stay denied*, 419 U.S. 802 (1974).

The Court finds that these requirements have not been met. The Court agrees with defendants that the "likelihood of success" standard is somewhat anomalous as applied to a Rule 62 motion in district court, for it appears to require the Court to confess error. The test might more appropriately be stated as whether the appeal raises serious and difficult questions of law where the law is unclear. *Evans v. Bucchanan*, 435 F. Supp. 832, 843 (D. Del. 1977). Defendants suggest that the meaning of "incremental segregative effect" in *Dayton v. Brinkman*, 433 U.S. 407 (1977), and the issue of special variances for Native American students are difficult and unsettled questions of law. The Court agrees that these questions are difficult, but also notes that to a large extent the injunction was premised on factual findings as to the reliability of defendants' statistics and on assessment of the equities involved in the proposed variance, rather than on a definitive resolution of unsettled legal issues. But nevertheless, assuming that this factor weighs in defendants' favor, all four elements required for a stay must be considered together and the remaining three decidedly do not support defendants' request.

Defendants suggest that implementation of the Order will cause irreparable harm because many changes in the school system are necessary to ensure compliance. These

are difficulties normally "incident to the transition from a dual to a unitary school system." *Jefferson Parish School Board v. Dandridge,* 404 U.S. 1219 (1971) (Marshall, J., Circuit Justice). Moreover, the contested injunction is more lenient than the Court's prior orders in effect since 1975. The argument that irreparable harm will occur through implementing a modification of an equitable decree, where the modification is *favorable* to defendants and lightens the duties they were already required to carry out, is entirely without merit. A stay is not appropriate "simply because a school board situates itself so as to make desegregation difficult."*Id.* at 1220.

The harm to plaintiffs and the public interest, on the other hand, is substantial. Although the District has generally acted in good faith, it is not entirely blameless for the delays in achieving full implementation of a unitary system. Plaintiffs' right to an equal educational opportunity has not yet been fully realized and should not be further denied even for a short time. The community need for certainty and stability can also best be achieved by vigorous and successful efforts to finally implement the plan. To be sure, if this Court's decision is reversed, some of the changes that have occurred in the interim will have been unnecessary. But the situation would be far worse if a stay were granted and the decision affirmed—the delay will only have added to uncertainty, greatly exacerbated the difficulties of compliance, put the school board in the position of having to devise new and different methods of complying, and, most importantly, will probably have set the six year long desegregation effort back by another full school year.



IT IS THEREFORE ORDERED THAT:

Defendants' request for a stay of the Order of May 22, 1978, pending appeal be, and hereby is, denied.

June 23, 1978.

/s/ EARL R. LARSON
United States Senior District Judge

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Portion of Transcript of Hearing before United States Court of Appeals for the Eighth Circut, dated September 15, 1978:

Judge Ross: How many cities of approximately this size have had integration orders directed to them and then have later got the court to withdraw the orders and eliminate the necessity of any further integration duties?

Mr. Krohnke: I do not know, Judge Ross.

Judge Ross: Do you know of any?

Mr. Krohnke: I do not know of any. I think that's significant. Throughout this entire effort of desegregation throughout the United States, it's hard to find any decision which says, "School district, you have finally done it. Congratulations. Godspeed. We're over and done with."

Judge Ross: Judge Henley may remember one year in which Little Rock and North Little Rock were integrated, but as I recall they are still under the order, are they not? At least the—

Judge Henley: I would assume so. I suppose they always will. They're under orders what, ten years or so, I guess.

Judge Ross: I just think, that looking at it from a prac-

tical standpoint, every school district in the country that's just got three or four years behind them will say "Look, we've done what you said. Let's go back."

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 78-1502

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JEANNETTE BOOKER, by CURTIS C. CHIVERS, her grandfather and guardian ad litem; DAVID G. HAGE, by GEORGE S. HAGE, his father and guardian ad litem; and MONTEZ WILLIS, by JAMES M. WILLIS, her father and guardian ad litem, on behalf of themselves and all others similarly situated,

Appellees,

vs.

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, SUPERINTENDENT OF SCHOOLS, Special School District No. 1, Minneapolis, Minnesota and CHAIRPERSON, Board of Education, Special School District No. 1, Minneapolis, Minnesota,

Appellants.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: September 15, 1978

Filed: October 12, 1978

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Before GIBSON, Chief Judge, and ROSS and HENLEY, Circuit Judges.

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HENLEY, Circuit Judge.

This is an appeal by public school authorities of Minneapolis, Minnesota,[1] from an order entered on May 22, 1978 by District (now Senior) Judge Earl R. Larson of the United States District Court for the District of Minnesota in a school integration suit commenced in 1971 by and on behalf of Negro students residing in the District. Plaintiffs were permitted to maintain the action as a class suit for the benefit of all public school students in the District, including white, black and Indian (Native American) students and other groups of students who were members of identifiable minority groups.

In 1972 Judge Larson found that since at least 1954[2] the public schools of the District had been racially segregated, that the segregation that had existed and continued

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[1]The defendants are Special School District No. 1 of Minneapolis which includes all of the public schools of the District, the District's Superintendent of Schools, and the Chairperson of the District's School Board. The defendants will be referred to collectively as either the District or the Board.

[2]It was in 1954 that the Supreme Court handed down its initial decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), holding that legally imposed racial segregation of public schools is a violation of the equal protection clause of the fourteenth amendment.

to exist was due at least in part to Board action intentionally taken, and that the segregation had to be eliminated. While the district court was able to approve in large measure a desegregation/integration plan that the Board had submitted pendente lite, Judge Larson felt that the plan had to be strengthened in certain areas including both student and faculty integration. The decree established guidelines for allowable percentages of minority students that might be enrolled in the respective schools of the District; it dealt with faculty integration in both elementary and secondary schools; it forbade further school construction without judicial approval; and it required the Board to submit semiannual status and progress reports to the court. *Booker v. Special School District No. 1*, 351 F.Supp. 799 (D. Minn. 1972). There was no appeal from that decree.

Between May, 1972 and May, 1978 the Board submitted ten semi-annual reports, and in those reports it requested from time to time that modifications of the court's original directives be made, and from time to time the district court allowed modifications generally favorable to the Board. In 1977 the Board asked the district court to dissolve its injunction and release its jurisdiction in the case; Judge Larson refused to do so, and there was no appeal from his order.

In its tenth semi-annual report filed in early 1978 the Board renewed its request for a dissolution of the injunction; alternatively, it prayed for leave substantially to increase minority enrollments in individual schools and particularly in schools having a high concentration of Indian students.

The district court dealt with the alternative prayers for



relief in a full but unpublished opinion. It refused to dissolve the injunction. It did grant some limited relief in the area of minority assignments. The relief was not satisfactory to the Board, and it appealed. The district court refused to stay its order pending appeal, and presumably it went into effect with the opening of school in September of the current year.

For reversal the District contends that in view of the progress that it has made toward integration and in view of recent Supreme Court decisions the district court should have dissolved its injunctive orders in toto. The principal cases cited by the Board are *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); and *Washington v. Davis*, 426 U.S. 229 (1976). Alternatively, the Board contends that the district court erred when it refused to permit the District to enroll minority students up to 50% in any school and up to 60% in schools having an Indian student population of 30% or more.

As to the differentiation between 50% and 60% in schools where Indian students are concentrated, the Board argues that the differentiation is necessary if the Indian students are to derive full benefit from federal programs designed to meet the special educational needs of Indian students, and which programs have been federally funded. The Board also argues that the plan mandated by the district court unreasonably disperses Indian students throughout the individual schools operated by the District.

We pause for a moment to observe that this is a three-

sided lawsuit. We have, to begin with, the plaintiffs and the defendants. But the district court allowed and we have allowed limited participation in the case by *amici curiae* consisting of the federal Department of Justice and certain organizations said to be devoted to the educational and other interests of Indians.[3]

The position of the Negro plaintiffs and of the Department of Justice is that the 1978 decision of the district court should simply be affirmed. The position of the other *amici* is that the Indian children in the District are entitled to special consideration, and should not be deprived of the benefits of programs designed for the needs of Indian students, which programs apparently are not available in all of the District's schools.[4]

The disputes in the case do not involve so much what the underlying facts are but rather what further action, if any, should be taken if effective integration of the Minneapolis public schools is to be achieved and if the legitimate interests of Indian children in the area of special education are to be protected.

## I.

Historically, the population of Minneapolis has been overwhelmingly Caucasian. However, at least in recent

[3]Those organizations are Indian Parent Committee of Minneapolis; Little Earth of United Tribes, Inc.; and Indian Health Board of Minneapolis, Inc. In connection with this appeal the *amici* which have been mentioned were permitted to file briefs that have been considered by us along with those filed by the principal parties.

[4]Federally funded programs geared specifically to Indian education have been established through the years by a number of federal statutes which we find it unnecessary to mention here. Those statutes and programs are listed and discussed in Rosenfeld, *Indian Schools and Community Control*, 25 Stan. L. Rev. 492 (1973), cited by the district court in its 1978 opinion. *See also* Chavers, *Indian Education, Failure For The Future?*, 2 Am. Indian L. Rev. 61 (1974).



years the City has acquired a minority population that is made up principally of blacks and Indians, although some smaller identifiable minority groups are present.

During the 1971-72 school year when this litigation was commenced the District was operating 94 schools. There were 11 high schools, 15 junior high schools, and 68 elementary schools.

The total enrollment during the year just mentioned was 65,201 students of which 55,735 were white. There were 6,351 Negroes in the system, making up a little less than 10% of the student population. There were 2,225 Indians who made up slightly more than 3% of the population, and there were 890 other students who would be classified as minority students. Thus, the over-all minority student percentage in the schools was about 14.5%

It should be kept in mind, however, that this small minority student population was not distributed evenly among the schools. As in other cities throughout the country, the minority populations of Minneapolis were concentrated in limited areas due to economic conditions, low rent housing policies, and the natural desire of people of the same race or ethnic group to live in the same neighborhoods. As a consequence of this segregated residential pattern, and the adherence of the Board to the conventional neighborhood school doctrine, the minority school population of Minneapolis has been concentrated in a few of the numerous schools operated by the District, and those few schools have been racially definable. The situation that existed in the District's schools in 1971-72 is fully described in Judge Larson's original opinion, *supra*, 351 F.Supp. at 802-03.

Judge Larson found that in 1972 a system-wide segre-

gated school system existed, and that the system had in large measure been created and maintained by intentional actions on the part of school authorities that were calculated to segregate the schools along racial lines. 351 F.Supp. at 803-06.[5] Although Judge Larson found that under the pressure of the litigation great strides toward desegregation had been made by the District, he also found that prior to the filing of the suit very little had been done toward voluntary integration, and the lack of action had admittedly been due to public opposition to the concept of integration. 351 F.Supp. at 806.

Finding that the segregation that existed in the schools of the District was unconstitutional, the district court directed that it be eliminated, and in that connection it established guidelines for the assignment of minority students to schools and for faculty desegregation.[6] As to guidelines for student assignments, the district court did not initially distinguish between members of various minority groups; the court simply stipulated that the minority enrollment in any school was not to exceed 35% of the total population.[7]

Since there was no appeal from the original order or

[5]*Cf. United States v. School Dist. of Omaha ("Omaha I")*, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975), wherein we held that where public authorities, including school officials, take actions the natural, probable and foreseeable consequence of which is racial segregation, a rebuttable presumption arises that the actions in question were motivated by "segregative intent." As to the necessity for the establishment of "segregative intent" in discrimination cases, *see* the discussions in *Washington v. Davis* and *Village of Arlington Heights v. Municipal Housing Corp.*, both cited *supra. See also Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978).

[6]We are not concerned here with faculty desegregation.

[7]The 35% figure was a maximum allowable figure. Actually, as the 1978 opinion of the district court points out, that figure was deliberately set at 20% above the projected actual minority enrollments in most of the District's schools. Minority students simply do not make up 35% of the Minneapolis school population.



decree, we start with the proposition that as late as May, 1972 the Minneapolis public schools were racially segregated, and that the segregation was system-wide.

## II.

Between the spring of 1972 and the spring of 1975 the total enrollment in the Minneapolis public schools fell sharply but proportional minority enrollment increased. In its fifth semi-annual report that was filed in early 1975 the District sought leave to increase the permissible minority enrollments in various schools in the District. Judge Larson considered the matter in a full opinion that was filed on May 7, 1975.

The judge found that between 1972 and 1975 total minority enrollment had risen from 14.5% to 17.7%. During the same period of time the Indian student population had increased by 14% although the total student population had fallen by 9%. Comparing 1975 with 1968 the district court found that during that 17 year period total public school enrollment had fallen by 20% but that Indian student population had jumped by 80%.

Nevertheless the district court found that with respect to most schools and clusters of schools, its original 35% limit on minority enrollment continued to be valid. One exception was the "cluster" of elementary schools consisting of the Bethune, Hall, Holland and Webster Schools. With respect to those schools Judge Larson permitted total minority enrollments to be increased to 42% but with single minority enrollments to remain limited to 35%.[8]

[8]Assume arbitrarily that a given school in that cluster would have a total enrollment of 600 students consisting of whites, blacks and Indians with the whites in a decided majority. Under the 1975 ruling of the district court 252 of the 600 students could be Indians and blacks and 210 could be either Indian or black.

We can refer to those percentages as the 35/42% ratio. There was no appeal from that order.

In late June, 1976 the Supreme Court handed down its decision in *Pasadena City Bd. of Education v. Spangler, supra.* The majority of the Court held that once a school district has in fact achieved a neutral situation as far as race is concerned, the district is not required year after year to make shifts in pupil assignments merely to maintain "racial balance."

Encouraged by that decision, the Board made another effort in 1977 to secure a dissolution of the district court's injunctive orders. The district court felt that the situation that had prevailed in the *Pasadena* case was different from that prevailing in Minneapolis since at one identifiable point in time all of the schools in Pasadena had been racially "neutral," whereas such a situation had never existed in Minneapolis. Again, there was no appeal from the order of the district court.

## III.

The trends in school populations in Minneapolis that have been described persisted into 1978 when the Board filed its tenth semi-annual report which produced the order involved here. As has been indicated, the District sought primarily a total release by the district court of its jurisdiction over the Minneapolis schools, and alternatively it sought leave substantially to increase minority enrollments, particularly in the schools having a high concentration of Indian students.

By the time at which that report was filed, the Supreme Court had decided, in addition to the *Pasadena* case, *supra,* the cases of *Dayton Bd. of Education v. Brinkman*



and *Village of Arlington Heights v. Municipal Housing Corp.*, both cited *supra,* and it had also decided *Milliken v. Bradley,* 433 U.S. 267 (1977), and *Hazelwood School Dist. v. United States,* 433 U.S. 299 (1977).

In connection with the basic relief sought, the District relied primarily on the *Dayton* case. In that case the Supreme Court held that in integration context, as in other equitable contexts, a federal court should not prescribe a remedy broader than that required by the necessities of the case, and that only where system-wide segregation exists, is a system-wide remedy justified. Likewise the Court limited the obligation of school authorities in districts where racial segregation had long since ceased to be required by local law to the elimination of "incremental segregation." We assume that "incremental segregation" is segregation that has been imposed by intentional official action that is nondiscriminatory on its face but which actually and foreseeably results in segregation in addition to that which would have existed had the action not been taken.[9]

The district court did not consider that the recent decisions of the Supreme Court entitled the District to have the injunction dissolved, and it did not consider that the

[9]We have mentioned our decision in *"Omaha I"* which was decided substantially prior to the decision in the *Dayton* case. In *United States v. School Dist. of Omaha,* 541 F.2d 708 (8th Cir. 1976), *"Omaha II,"* we upheld a system-wide desegregation order entered by the district court, 418 F.Supp. 22 (D. Neb. 1976). However, the Supreme Court in view of the *Dayton* decision reversed and remanded *"Omaha II." School Dist. of Omaha v. United States,* 433 U.S. 667 (1977). We, in turn, sent the case back to the district court for reconsideration in the light of *Dayton. United States v. School Dist. of Omaha* (*"Omaha III"*), 565 F.2d 127 (8th Cir. 1977). However, it should perhaps be observed in connection with *"Omaha III"* that we limited the consideration of the district court to the question of remedy and not to the question of whether the Omaha public schools were unconstitutionally segregated.

District should be permitted to increase its minority enrollments to the extent that the District desired. Judge Larson did liberalize the guidelines from 35/42% to 39/46%, and he emphasized as he had pointed out in early stages of the litigation that the guidelines were not inflexible, and that they could be exceeded in particular and necessitous circumstances.

## IV.

Before discussing the correctness of the actions taken by the district court in May of this year, we consider it desirable to mention the standards that we apply in reviewing those actions.

There is no question that in a proper case a federal district court that has issued an injunction may vacate it or modify it if it is established that to continue it in force or without modification would work an inequitable result. That power is conferred by Fed. R. Civ. P. 60(b)(5), but it would exist even in the absence of that rule since a federal court of equity has inherent jurisdiction in the exercise of its equitable discretion and subject to appropriate appellate review to vacate or modify its injunctions. *Pasadena City Bd. of Education v. Spangler, supra,* 427 U.S. at 437; *System Federation v. Wright,* 364 U.S. 642, 647 (1961); *United States v. Swift & Co.,* 286 U.S. 106 (1932). The existence of that power is not seriously challenged here.

As is made clear in the opinion of the Supreme Court in the *Dayton* case, *supra,* 433 U.S. at 409-10 and 417-18, the basic responsibility for determining whether an injunction should be dissolved or maintained in force or whether and to what extent it should be modified rests



primarily on the shoulders of the district court that issued the injunction in the first place.

The function of the appellate court is not to make an initial decision but simply to review the action of the trial court. Ordinarily, our inquiry is limited to whether the factual findings of the district court are clearly erroneous, whether that court has applied correct legal standards to facts permissibly found, and whether judicial discretion has been abused in cases where discretion is a material or controlling factor. If the trial court has made proper findings of fact, has drawn proper conclusions of law, and has acted within the scope of its discretion, the appellate function is at an end. Otherwise, the appealing party is entitled to appropriate relief.

## V.

Seeking total relief from the district court's injunction, the Board obviously pinned its principal reliance on the *Dayton* case, cited *supra.*[10] The Board contended that it had eliminated incremental segregation, and that in any event the district court should relinquish jurisdiction in view of the good faith of the Board and the progress that had been made toward integration.

The district court was not persuaded in view of the fact that the segregation that had existed in Minneapolis was system-wide and had never been eliminated, and in view of the over-all history of the racial segregation of the Minneapolis public schools. Judge Larson found him-

[10]The problem presented in the *Arlington Heights* case was substantially different from the one presented here, and the same thing can be said about *Washington v. Davis.* As has been seen, in 1977 the district court held that the Minneapolis situation was not comparable to the Pasadena situation.

self unable to tell in Minneapolis where "original segregation" ended and where "incremental segregation" began, and he did not consider that continuing in effect the orders that he had entered and the guidelines that he had prescribed constituted an overbroad remedy for the Minneapolis problem. In short, Judge Larson was not willing to apply *Dayton* to Minneapolis any more than he had been willing to apply *Pasadena* to Minneapolis.

As to the Board's alternative prayer for leave to increase minority enrollments in individual schools, Judge Larson was not insensitive to the problems with which the Board was confronted when total public school enrollment was declining while at the same time proportional minority enrollments were increasing. He did not consider, however, that the District was entitled to all of the alternative relief that it sought.

To start with, the Judge found that there was a substantial failure on the part of the District to comply with the 35/42% guidelines previously established. Evidence of sight counts conducted by the District in the spring of 1977 indicated that 16 of the District's schools were not in compliance with those guidelines, and the court found that figures submitted in July, 1977 indicated that 7 out of those 16 schools continued to be out of compliance. Looking at the sight count evidence, it appeared to the district court that four of the schools had minority populations of more than 50%, that three of them had minority populations of more than 47%, and that ten of them were out of compliance with the 35% single minority figure.

As to the 50% figure sought by the Board for total minority percentages to 39/46%, but he made it clear that in view of the history of segregation in the District



any school that had a total minority enrollment as high as 50% would automatically be identified as a "black school" or at least as a "minority school."

The trial judge was willing to raise the allowable minority percentages to 30/46%, but he made it clear that those ratios had to be established with respect to the 1978-79 school year, and that they would not be liberalized later.

The determination of the district court that the Board should not be allowed to increase total minority enrollments at any school to as much as 50% automatically disposed of the Board's request that it be allowed to have minority enrollments of up to 60% in schools that had a concentration of Indian students. However, Judge Larson considered it desirable to discuss to some extent the alternative request of the Board that schools with a substantial concentration of Indian students should be permitted to have a minority enrollment of up to 60% of the total student population. Such a school would have Indians as a single component of a school population made up of whites, Indians, Negroes and members of other minority groups. While such a consist might be of some benefit to the Indian students, it would immediately condemn whites and Negroes and members of other minority groups to attend public schools identifiable as being schools devoted primarily to the education of minority students.

There is no question that in certain contexts separate classification and treatment of Indians as a race are constitutionally permissible in the light of the unique status of Indians in this country, and in the light of history and policy. In addition to the vast number of federal statutes that deal with Indians as Indians *see* such opinions as

*United States v. Antelope*, 430 U.S. 641 (1977); *Moe v. Confederated Tribes*, 425 U.S. 463 (1976); *Fisher v. Dist. Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974).

However, as the district court observed, the Supreme Court has not held that a school district is exempt from its obligation to eliminate racial segregation "root and branch," *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968), simply because the district's student population contains a substantial number of Indian students with specialized educational needs.

Judge Larson felt that to permit the District to take the alternative course that it desired to take as far as Indian students were concerned would raise a grave constitutional question. However, he found it unnecessary to decide that question. He felt that assuming that special classifications of schools containing a high percentage of Indian students could be justified constitutionally on the basis of a "compelling state interest," no such interest had been shown in the instant case. On the contrary, the district court found that the legitimate needs of the Indian students had been adequately met under the 35/42% guidelines, and that a fortiori they could be met under the 39/46% guidelines.[11]

[11]The district court noted that it was not confronted with any question of whether a state may permissibly create an "all Indian" school district in certain localities and in certain circumstances. And this case clearly does not present a question as to whether a state created district can constitutionally create or maintain an "all Indian" school within the borders of the district if particularly educational needs of Indians cannot be met fully in the ordinary schools of the district. The Minneapolis Board has never suggested such an approach to the problem of the education of its Indian students.



## VI.

It now ultimately becomes our task to apply to the findings and conclusions of the district court the review standards that we have mentioned previously.

In a school integration case involving a large metropolitan school district the task of a federal district court in formulating an appropriate equitable remedy is at best a delicate one. And in judging a district judge's performance of that task, a federal appellate court should pay great deference to the district judge's conclusions.

The instant case was filed in August, 1971, and Judge Larson has worked with it for more than seven years. As the Addendum to the Board's brief establishes, the trial judge has filed a total of at least fourteen opinions and orders in the case, the most important of which we have undertaken to discuss. Prior to 1978 the Board did not see fit to appeal from any of the orders of the district court, and it may be doing so now only because it seems to think that a new body of decisional law is in the making as far as the racial integration of schools in some parts of the country is concerned.

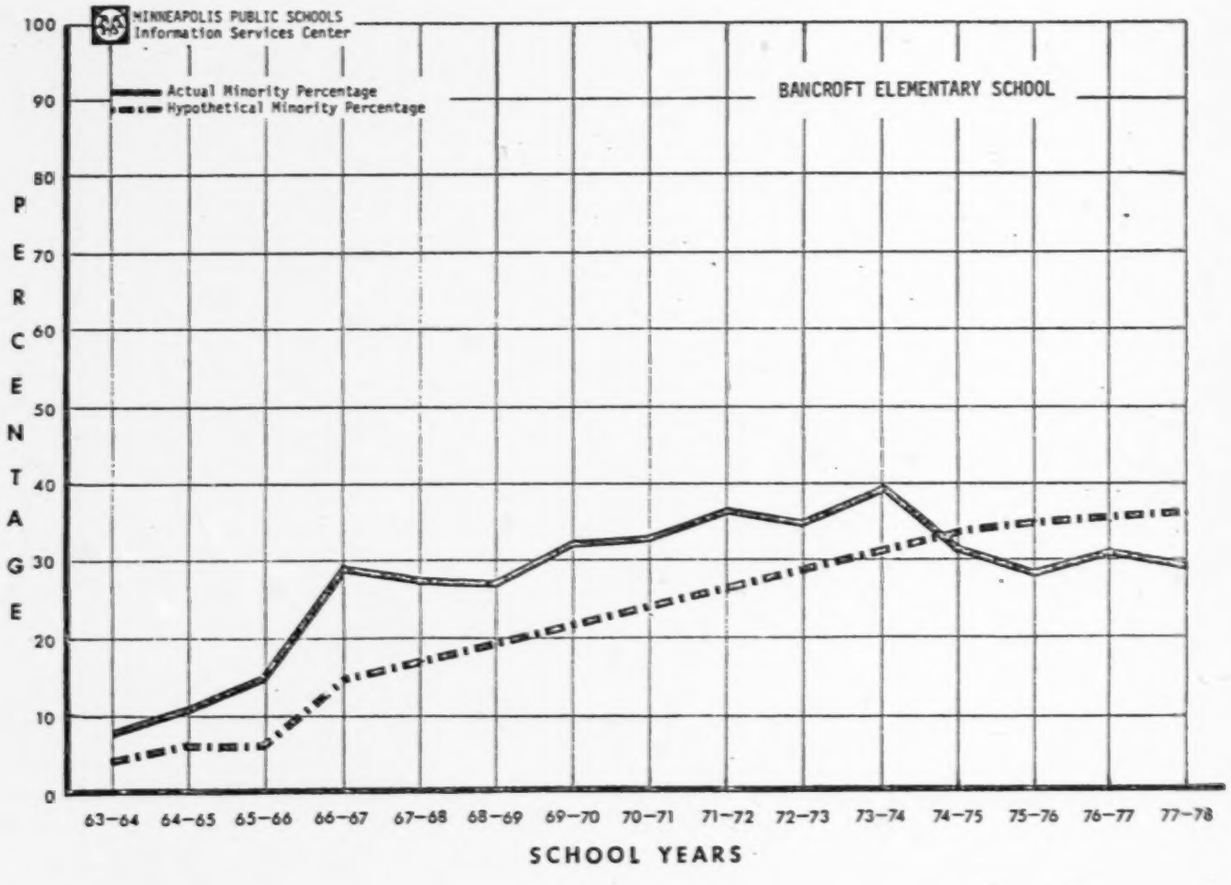
Judge Larson has a familiarity with this case and the problems that it presents that this court cannot easily obtain. We see nothing clearly erroneous in his factual findings; we see no misconceptions of law in his 1978 opinion; and we see no abuse of discretion in the results that he reached.

The judgment of the district court is in all respects affirmed.

A true copy.

Attest:

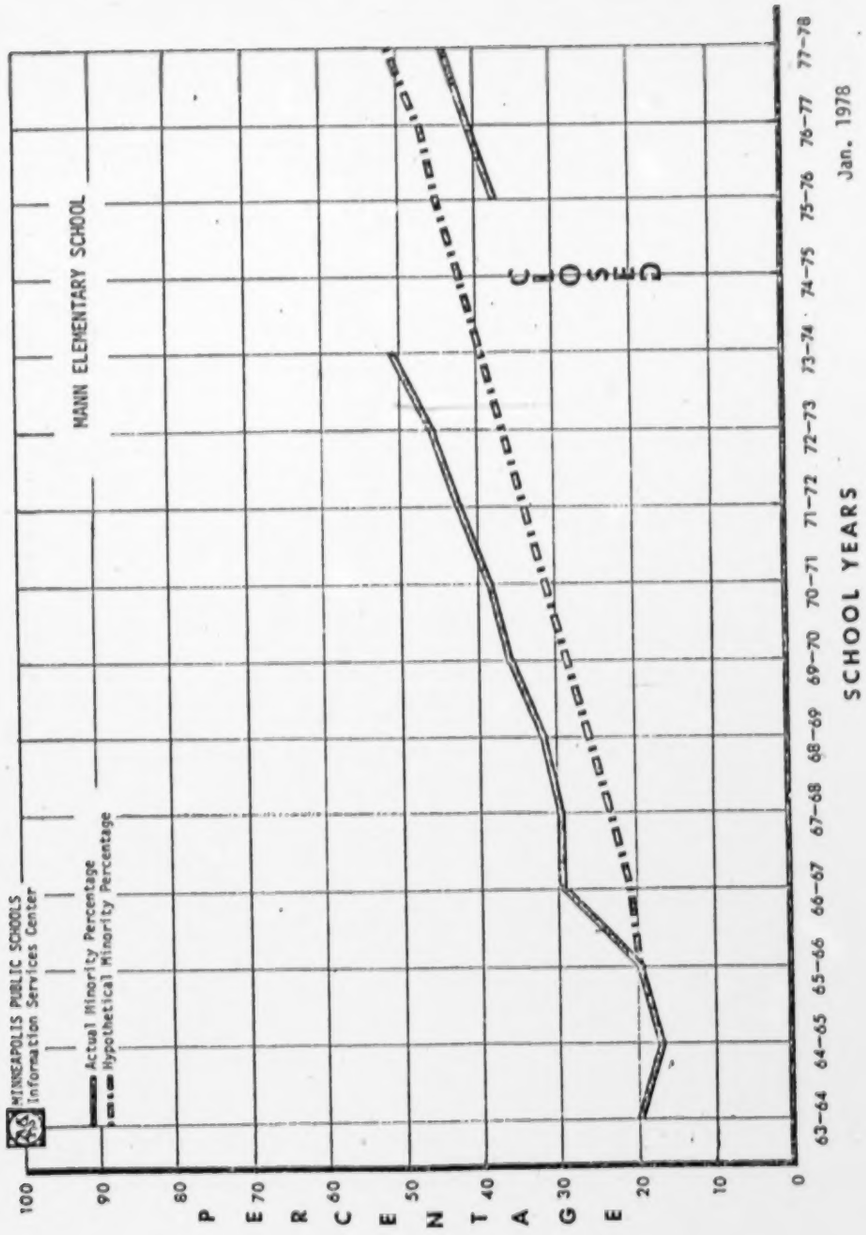
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.




Jan. 1978

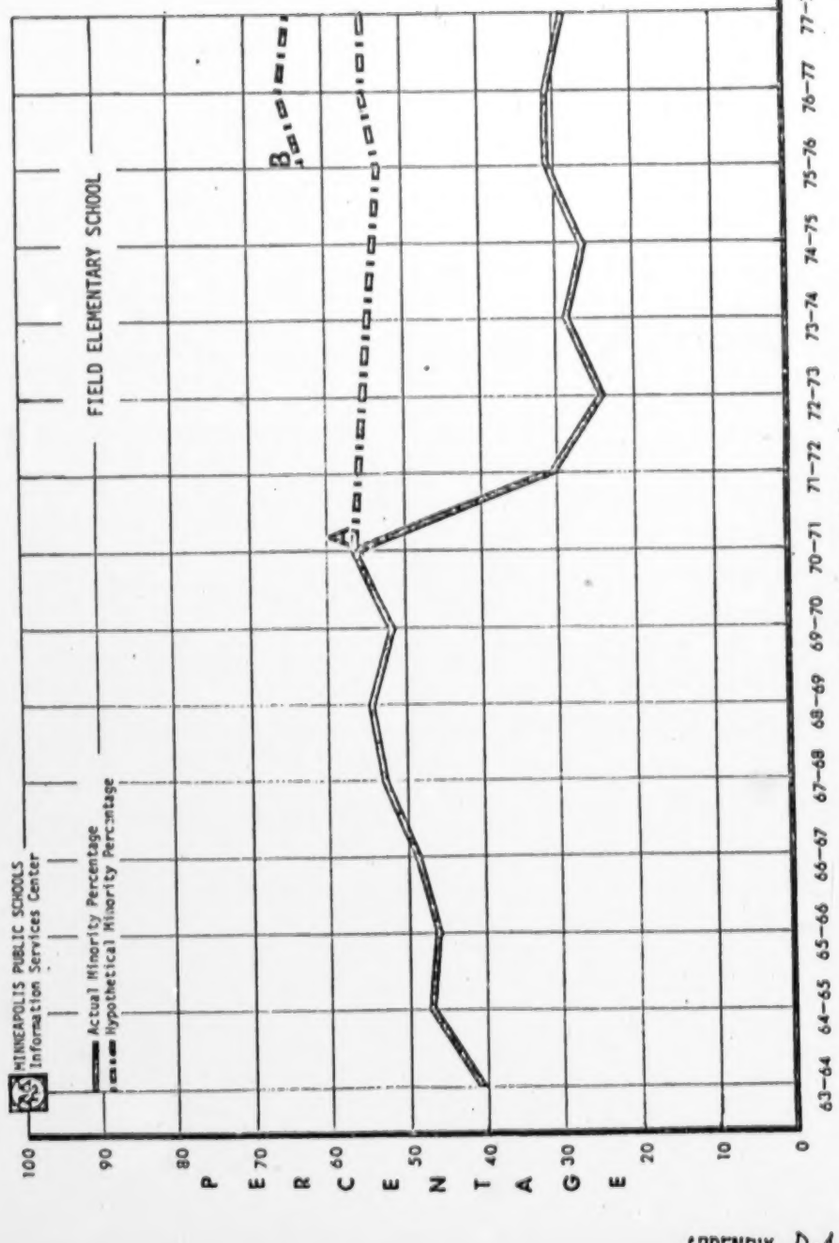


APPENDIX D-2

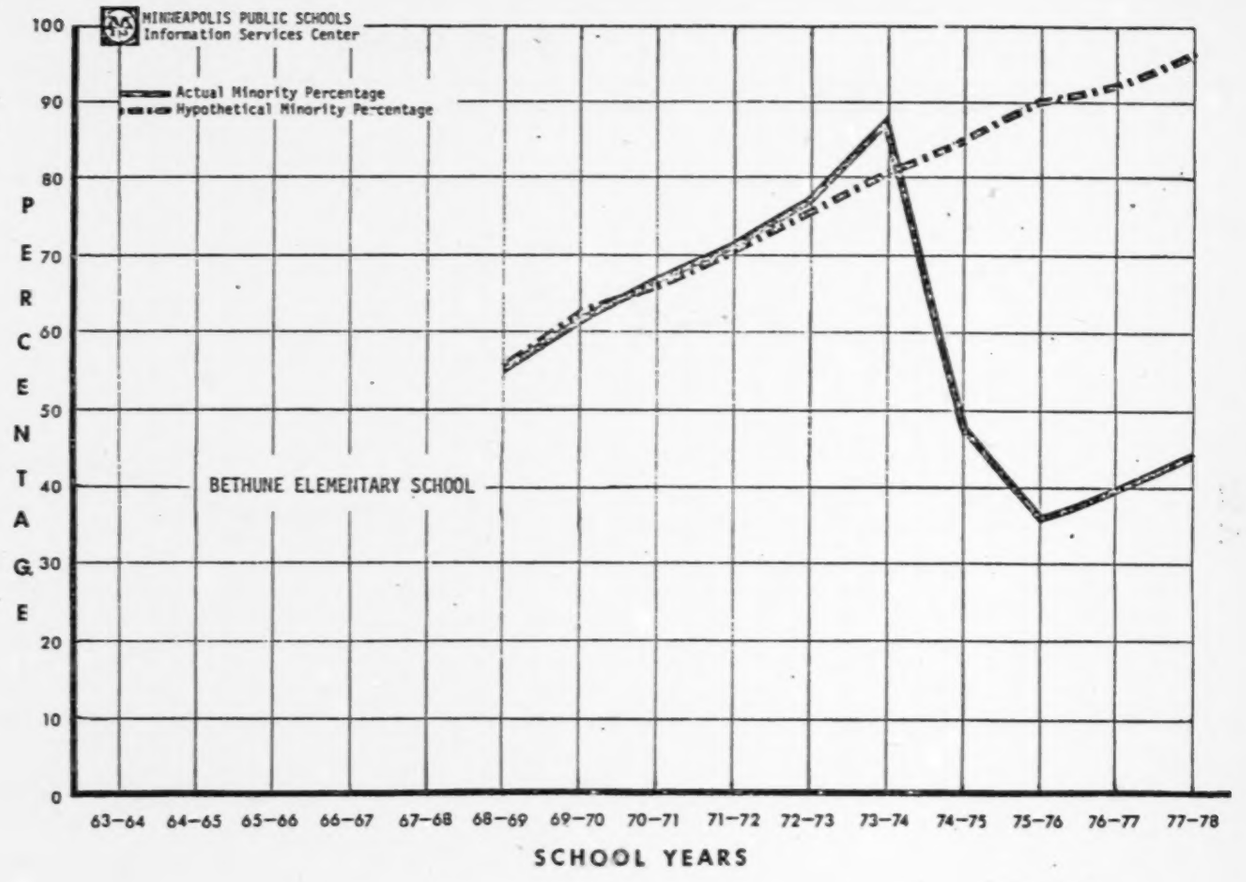



APPENDIX D-3





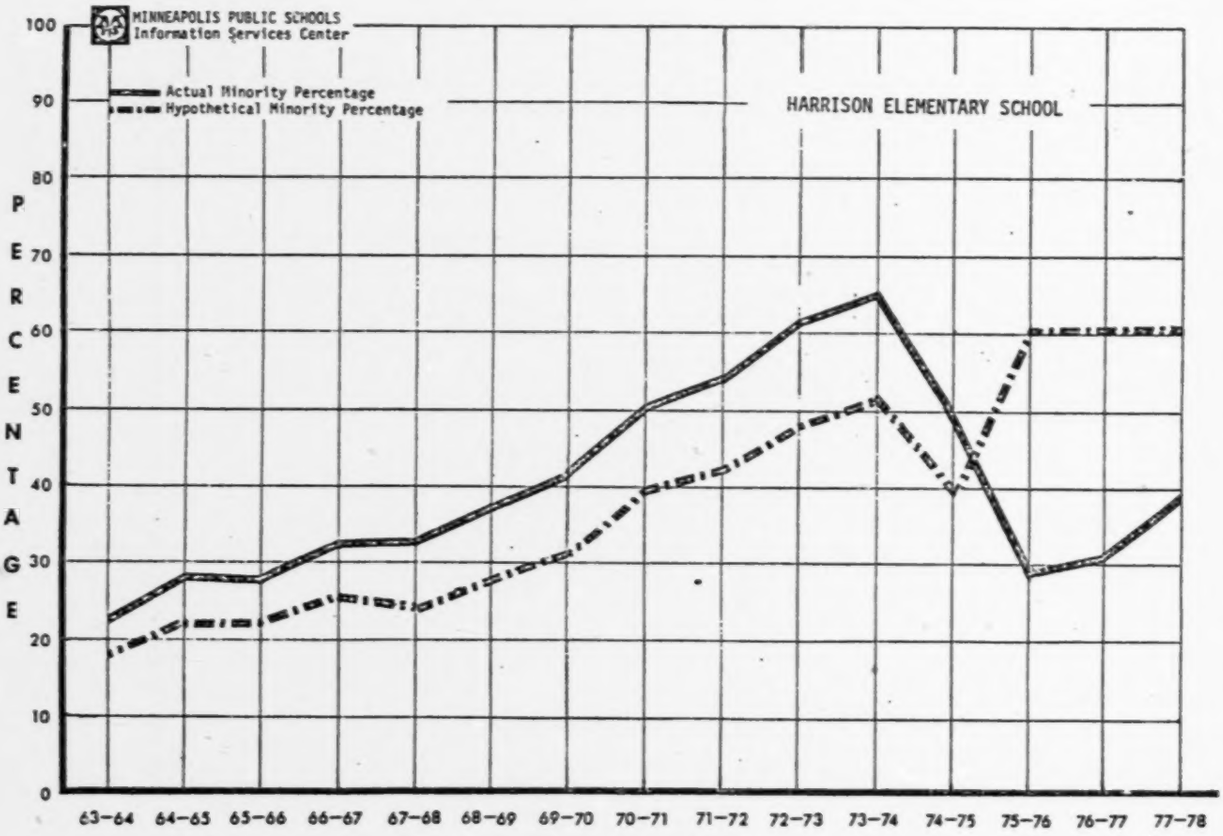

APPENDIX D-4




Jan. 1978

APPENDIX D-5

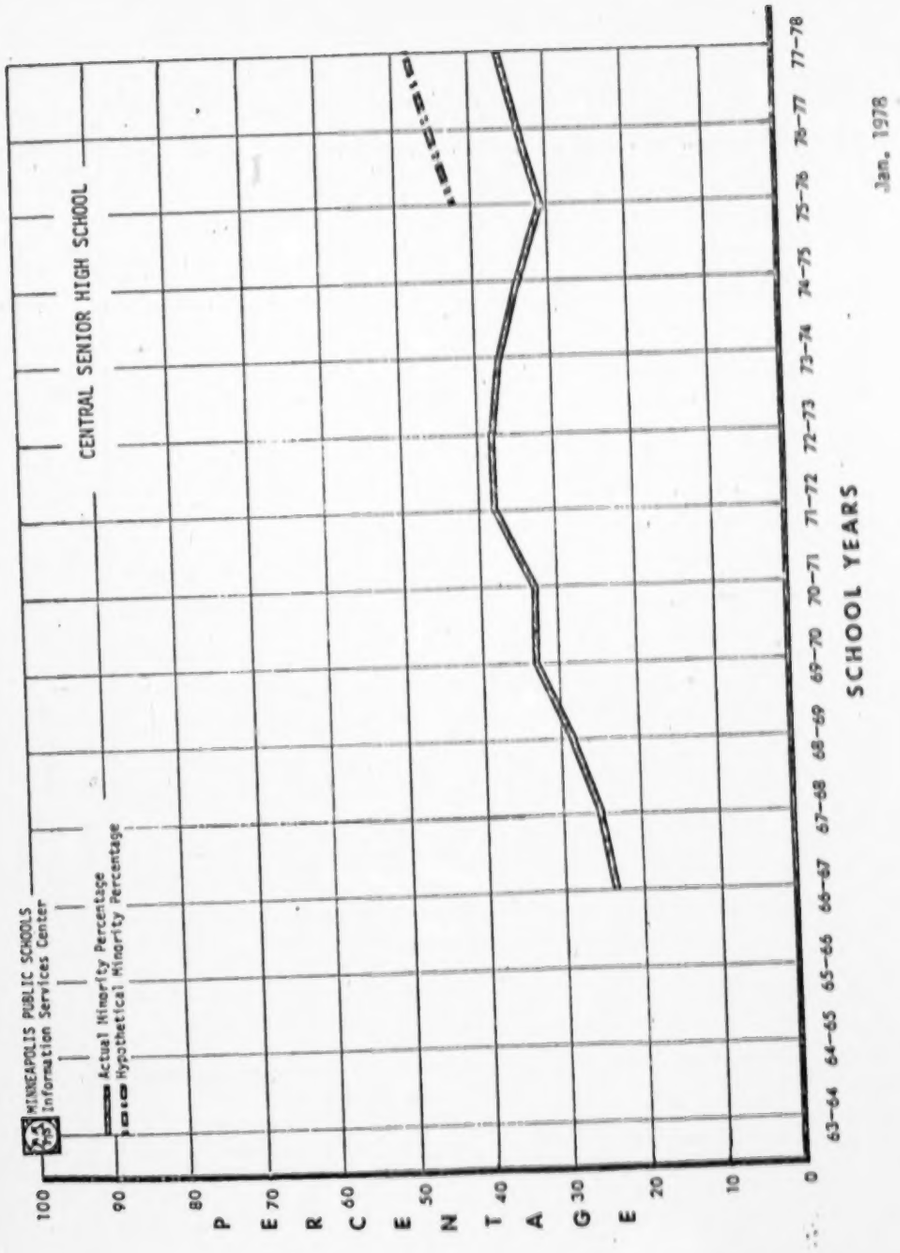
A-81




Jan. 1978

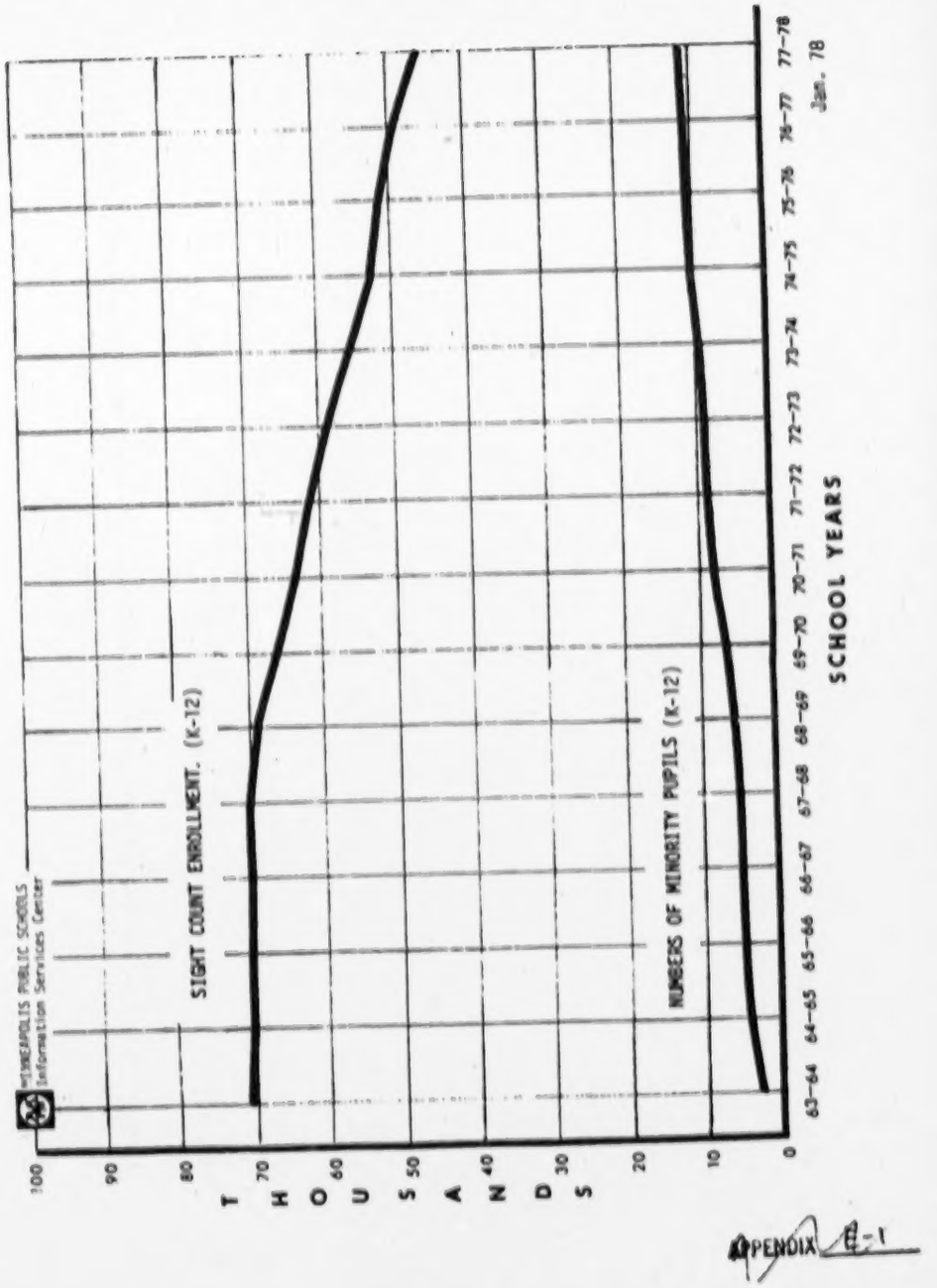
A-82

APPENDIX D-6

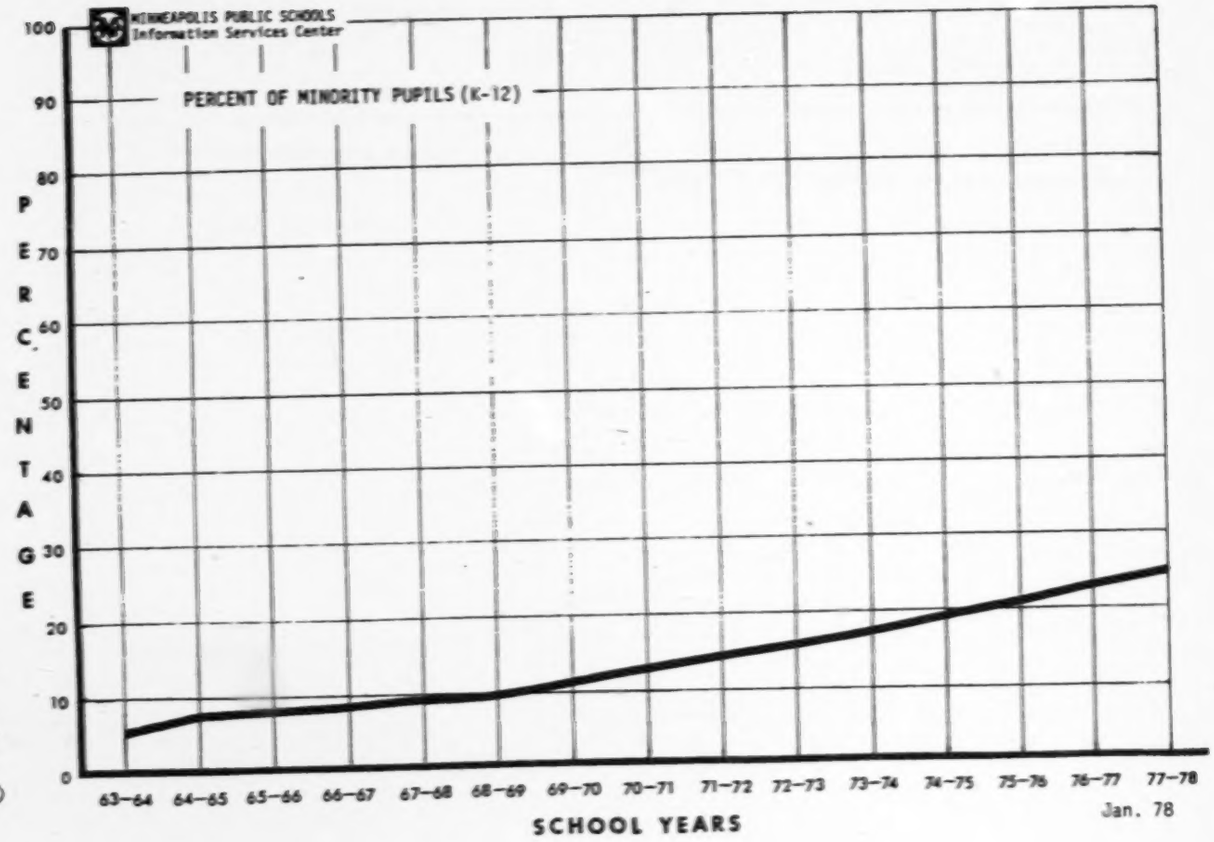



APPENDIX D-7





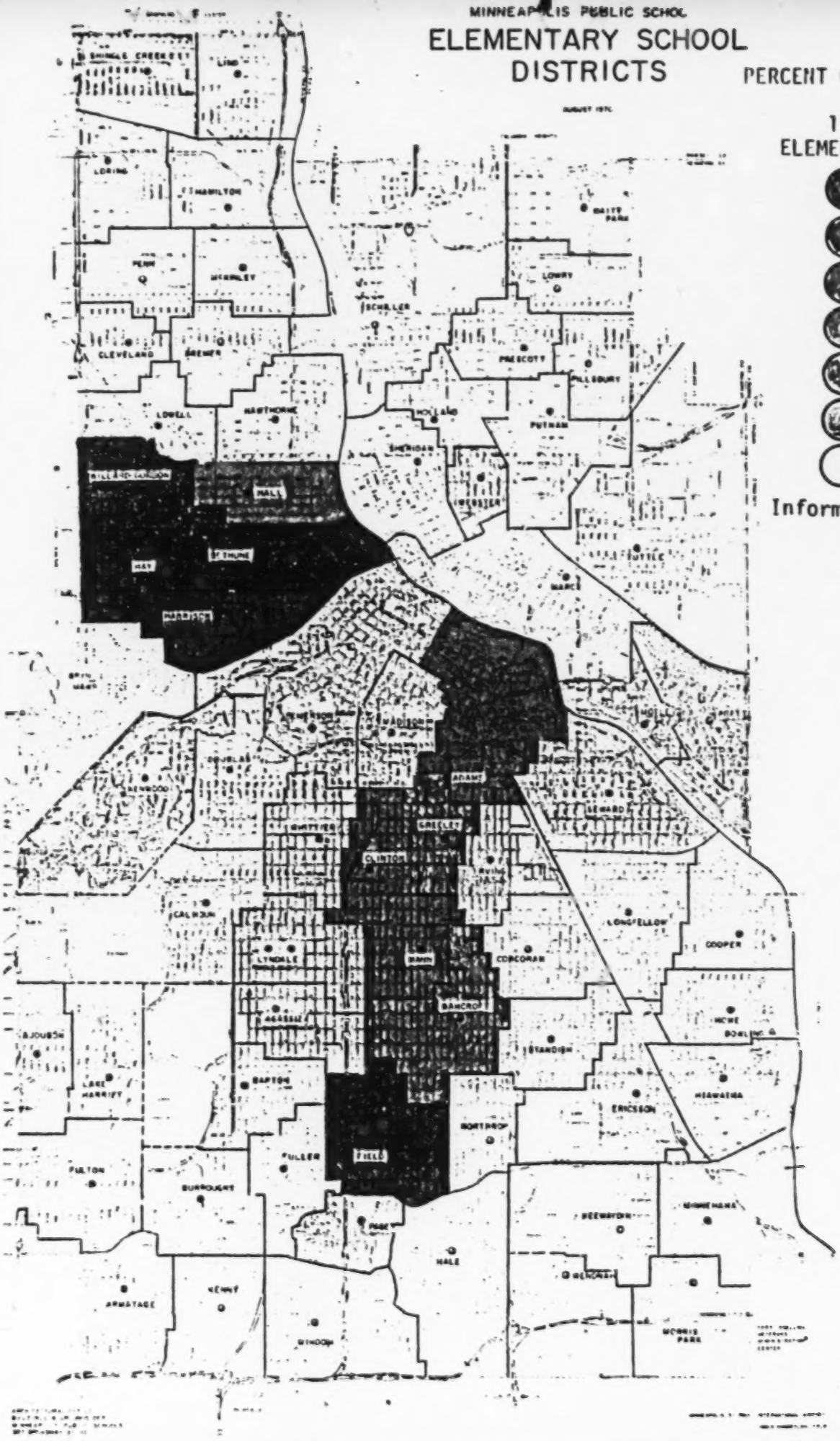

APPENDIX D-1


MINNEAPOLIS PUBLIC SCHOOLS
Information Services Center
PERCENT OF MINORITY PUPILS (K-12)
PERCENTAGE
100
90
80
70
60
50
40
30
20
10
0
63–64
64–65
65–66
66–67
67–68
68–69
69–70
70–71
71–72
72–73
73–74
74–75
75–76
76–77
77–78
SCHOOL YEARS
Jan. 78

APPENDIX A-7

MINNEAPOLIS PUBLIC SCHOOL

# ELEMENTARY SCHOOL DISTRICTS




PERCENT OF MINORITY PUPILS
in the
1970 ACTUAL
ELEMENTARY LOCATIONS

- 55–100%
- 50–54%
- 43–49%
- 35–42%
- 30–34%
- 11–29%
- 0–10%

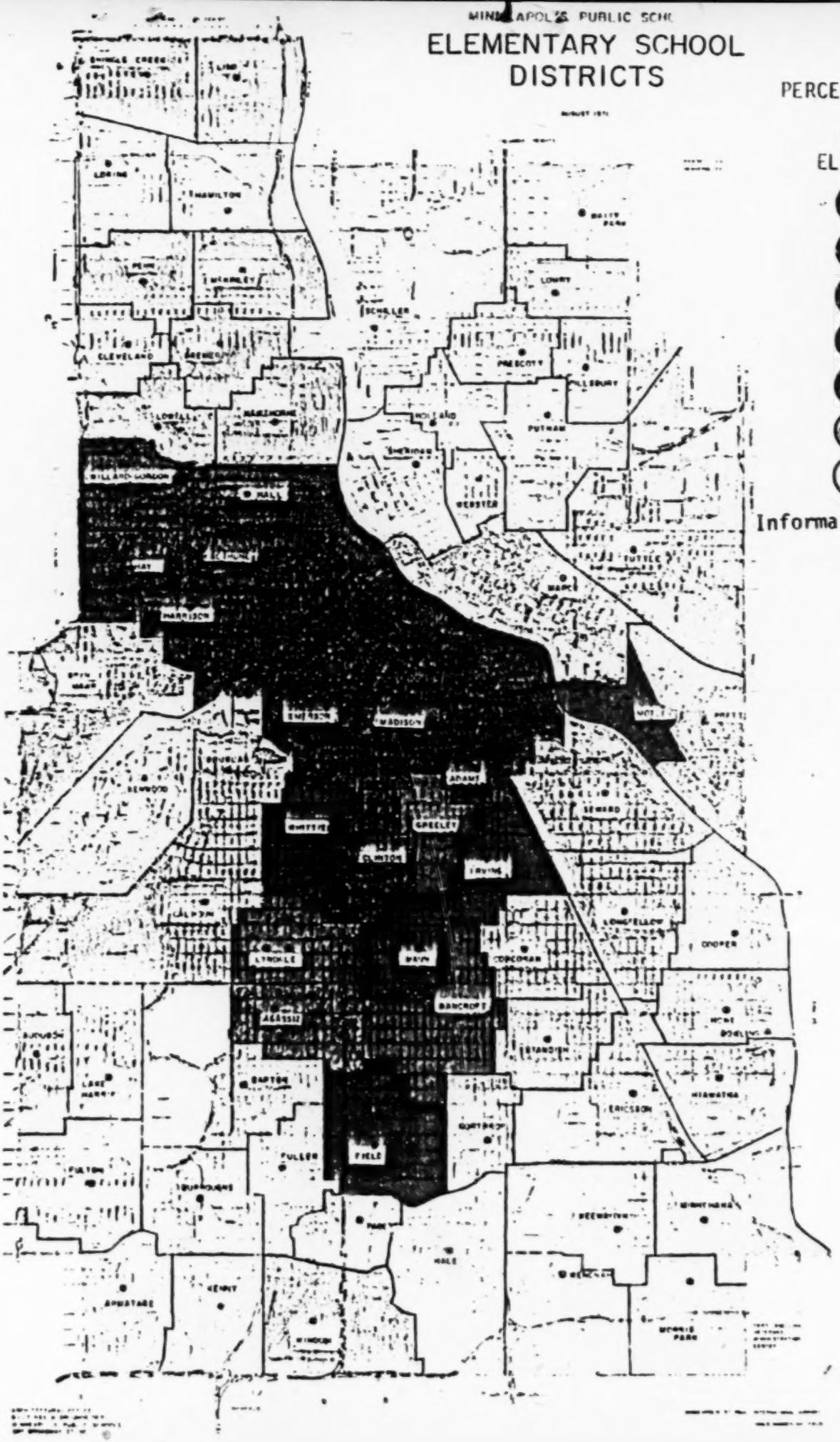
Information Services Center
Jan. 78



APPENDIX A-1

MINNEAPOLIS PUBLIC SCHS

# ELEMENTARY SCHOOL DISTRICTS




PERCENT OF MINORITY PUPILS
in the
1977 HYPOTHETICAL
ELEMENTARY LOCATIONS

- 55—100%
- 50—54%
- 43—49%
- 35—42%
- 30—34%
- 11—29%
- 0—10%

Information Services Center
Jan. 78

88-A

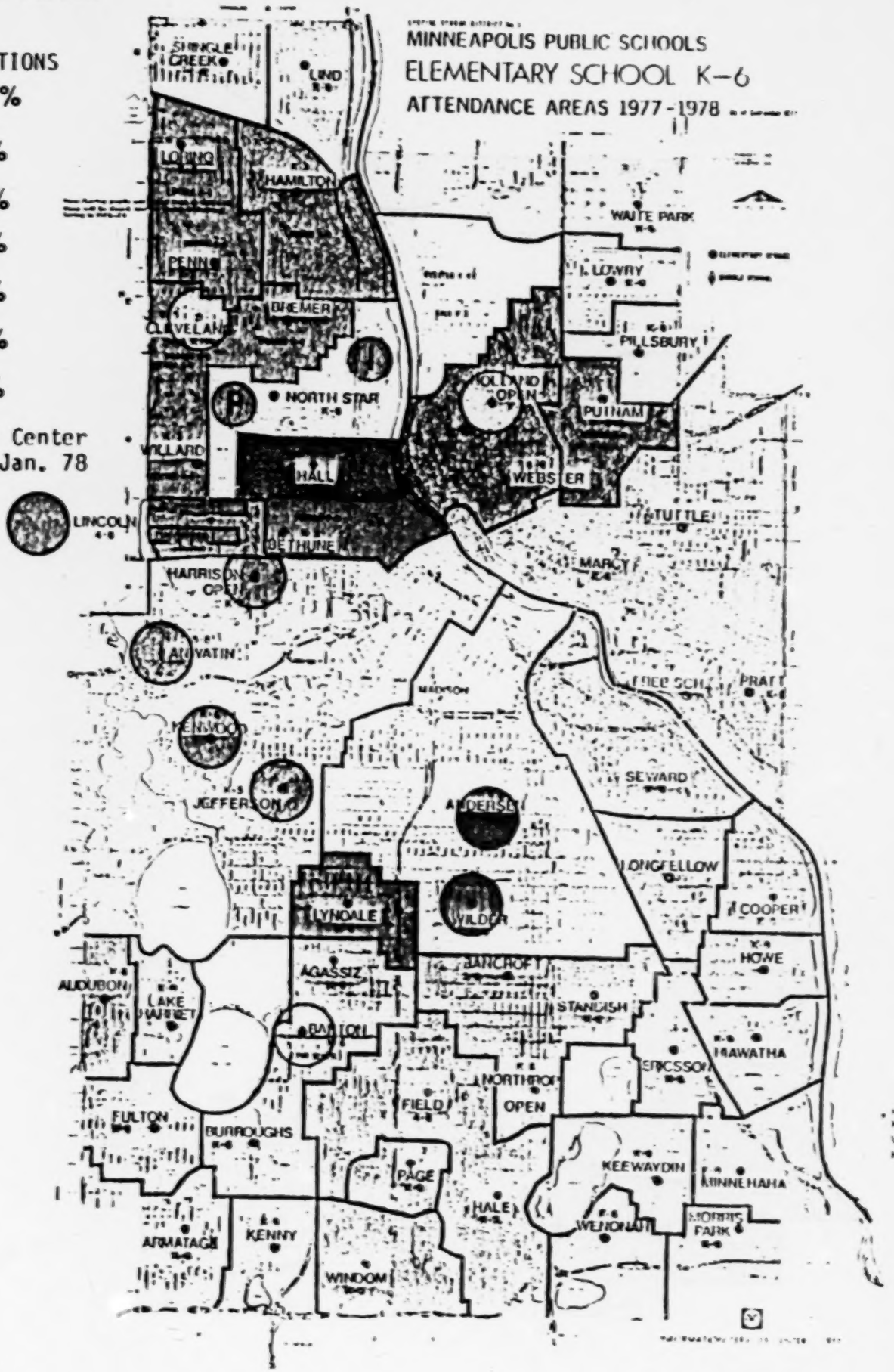
A-89

APPENDIX B-1

PERCENT OF MINORITY PUPILS
in the
1977 ACTUAL
ELEMENTARY LOCATIONS

- 55—100%
- 50—54%
- 43—49%
- 35—42%
- 30—34%
- 11—29%
- 0—10%

Information Services Center
Jan. 78




A-90

A-91

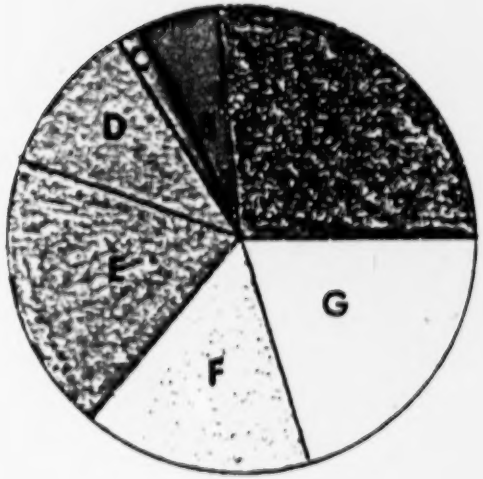
APPENDIX C-1

MINNEAPOLIS PUBLIC SCHOOLS
Information Services Center

APPENDIX D-1

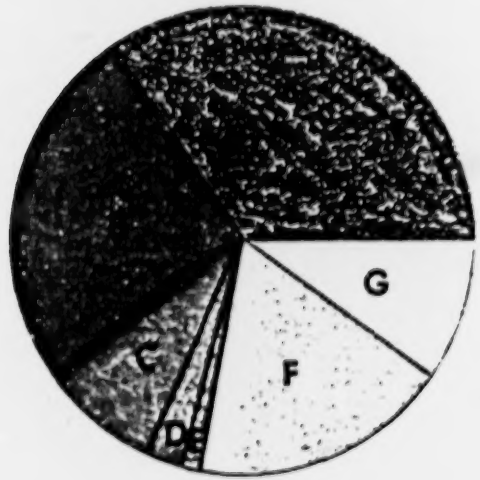
NUMBER OF BUILDINGS IN RANGES OF PERCENTAGE OF MINORITY PUPILS
WITH NUMBERS AND PERCENT OF TOTAL MINORITY PUPILS

1970 ACTUAL SCHOOL DISTRICT



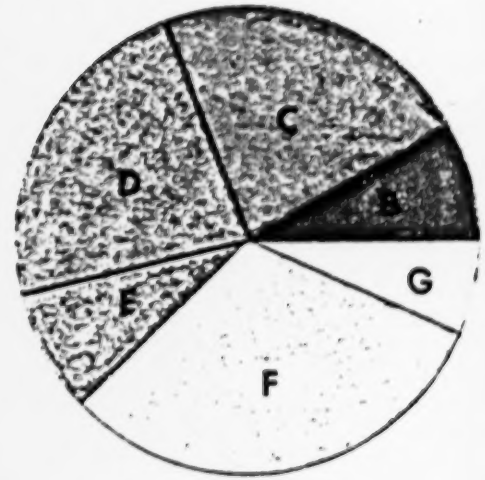

| PERCENT MINORITY RANGES | | NUMBER OF BUILDINGS | NUMBER OF MINORITY PUPILS | PERCENT OF MINORITY PUPILS |
|---|---|---|---|---|
| A | 55-100 | 5 | 2,253 | 26.82 |
| B | 50-54 | 1 | 467 | 5.56 |
| C | 43-49 | 1 | 123 | 1.46 |
| D | 35-42 | 4 | 951 | 11.32 |
| E | 30-34 | 6 | 1,584 | 18.86 |
| | 11-29 | 15 | 1,315 | 15.66 |
| | 0-10 | 60 | 1,706 | 20.31 |
| | Totals | 92 | 8,399 | 99.99 |

1977 HYPOTHETICAL SCHOOL DISTRICT



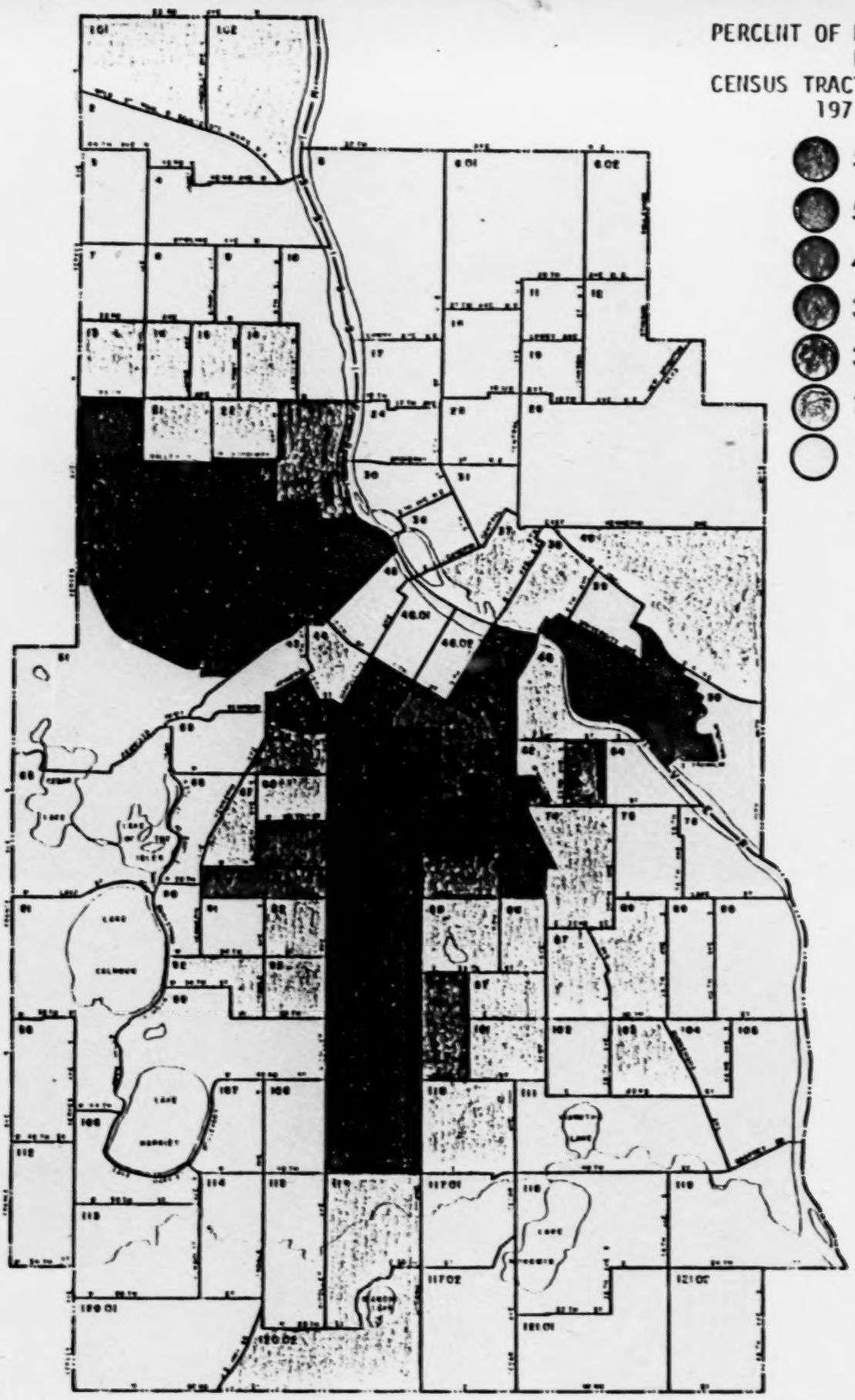

| NUMBER OF BUILDINGS | NUMBER OF MINORITY PUPILS | PERCENT OF MINORITY PUPILS |
|---|---|---|
| 11 | 3,824 | 34.43 |
| 7 | 2,922 | 26.31 |
| 4 | 868 | 7.81 |
| 1 | 253 | 2.28 |
| 1 | 121 | 1.09 |
| 25 | 2,028 | 18.26 |
| 43 | 1,091 | 9.82 |
| 92 | 11,107 | 100.00 |

1977 ACTUAL SCHOOL DISTRICT




| NUMBER OF BUILDINGS | NUMBER OF MINORITY PUPILS | PERCENT OF MINORITY PUPILS |
|---|---|---|
| 0 | 0 | 0.00 |
| 4 | 917 | 8.22 |
| 8 | 2,525 | 22.64 |
| 11 | 2,560 | 22.95 |
| 5 | 940 | 8.43 |
| 30 | 3,468 | 31.09 |
| 20 | 744 | 6.67 |
| 78 | 11,154 | 100.00 |

Jan. 78




APPENDIX F

MINNEAPOLIS PUBLIC SCHOOLS
Jan. 78
INFORMATION SERVICES CENTER

Supreme Court, U. S.
FILED
DEC 14 1978
R., CLERK

IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-781

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, SUPERINTENDENT OF SCHOOLS, SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota and CHAIRPERSON, BOARD OF EDUCATION, SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota,

*Petitioners,*

vs.

JEANETTE BOOKER, by CURTIS C. CHIVERS, her Grandfather and guardian ad litem; DAVID G. HAGE, by GEORGE S. HAGE, his father and guardian ad litem; and MONTEZ WILLIS, by JAMES M. WILLIS, her father and guardian ad litem, on behalf of themselves and all others similarly situated,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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1978—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

IN THE

# Supreme Court of the United States

October Term, 1978

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No. 78-781

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SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, *et al.*,

*Petitioners,*

vs.

JEANETTE BOOKER, *et al.*,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

---

Respondents oppose the application for a writ of certiorari on two principal grounds: first, the trial court and the court of appeals properly decided the matter; and second, the petition involves no significant issue for this Court, as petitioners presented no credible evidence to support their motion to dismiss.

### Questions Presented

(1) Whether the court of appeals may affirm a district court's decision not to dismiss a school integration suit, when defendants have never complied with unappealed

1972 judgment and have not eliminated the effects of their past wrongful conduct.

(2) Whether the court of appeals may affirm a district court's decision to grant nearly one-half, but not all, of the defendants' requested alternative relief, when defendants have never complied with unappealed 1972 judgment and have not eliminated the effects of their past wrongful conduct.

## Statement

On May 24, 1972, the trial court entered its final, unappealed judgment requiring defendant school district to "eliminate the effects of its prior unlawful activities" (A-33 and 34). The judgment was based on findings of widespread, systematic, systemwide segregative conduct. That conduct included segregative assignment of teachers, consisting both of assigning teachers on the basis of race, with most black teachers assigned to identifiably black schools, and of assigning the least trained, lowest paid teachers to black schools (A-22-25). It also included a series of "decisions . . . as to school size over the past fifteen years . . . [that] had the effect of increasing racial segregation" (A-22), decisions as to the location of schools and portable class rooms (A-18-19), decisions as to boundary changes (A-21), a deliberate policy of allowing special transfers "in which race was a major factor" (A-21), a "general course of conduct . . . to create optional attendance zones along the perimeters of minority neighborhoods" ("[o]ften [with] the intended effect . . . to allow white students to 'escape' ") (A-22), decisions that a number of schools should be "purposefully maintained as identifiably 'Black



schools' " (A-26), and decisions to accede to "public pressure not to integrate" (A-27).

On the basis of such findings, the trial court concluded:

> As a matter of law, the *intended* and inevitable effect of a series of policy decisions made by the defendant Special School District #1, Minneapolis, Minnesota, with respect to size and location of schools, attendance zones, enrollment of various schools, transfer policies, and teacher assignments as described in the Findings of Fact set out above has been to aggravate and increase the racial segregation in its schools. (A-32-33) (emphasis supplied)

In 1972, the Minneapolis Public Schools were in the process of vast, thorough-going changes in their method of operation. They were faced with declining enrollments, increasing percentage of black and Indian enrollments, a one-time availability of tens of millions of dollars in new construction funds, the need to close tens and even scores of schools, and the new availability of state funds to pay for transportation in school pairings and clusters. The District had begun a pilot program of school clusterings, the Southeast Alternative Schools (using identifiably white schools for its model), and a pilot pairing program (using an identifiably white and an identifiably black school for the model). The integrative program was delayed due to public opposition (A-27). The danger was real that the District would continue to use neighborhood schools to serve areas that were identifiably black[1] and offer more attrac-

[1]Defendants suggest (f.n. 1, p. 4, Petition) that residential segregation in Minneapolis was a result of natural forces. The undisputed, unappealed finding in this case is, "Residential segregation [in Minneapolis] is in large part due to racial discrimination," discrimination actively practiced by realtors and municipal and federal governmental agencies (A-25-26 and Third Party Complaint).

tive options only or primarily to residents of white residential areas. It was in this context that the trial court made its undisputed, unappealed finding that the District "purposefully maintained . . . identifiably 'Black schools' " (A-26).

Having found that defendants purposefully maintained identifiably black schools, the trial court acted to erase that identification. At trial in 1972, the District's superintendent testified that in Minneapolis a school 30 percent black was an identifiably black school [Tr. (4/11/72) 162; Davis deposition (1/26/72)]. That testimony formed the principal basis for the trial court's order as to permissible levels of enrollment by race in the new schools the District would be creating and in those of its old schools the District would retain. From time to time the trial court has modified its 1972 judgment, the most significant changes for present purposes being to increase the permissable levels of minority enrollment at each school to keep pace with changes in the District's population.

Defendants had never complied with the trial court's orders as to the necessary extent of student integration. They never appealed the 1972 judgment, nor did they appeal follow-up orders in the succeeding years, including the order of July 11, 1977. That order denied defendants' 1977 motion to dissolve the injunction herein, a motion based at first on the decision of this Court in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976) and then on *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).

Rather than complying with the trial court's July 1977 order (to prepare for full compliance in 1978), defendants in 1978 renewed their motion to dismiss. In the alternative, they asked for a revision in the injunction's racial guidelines. The trial court denied the first motion and granted the second in part, raising permissible minority enrollments by nearly one-half[2] the amount defendants requested.



In support of their motion to dismiss defendants attempted to prove that they have eliminated the incremental segregative effect of their past misconduct. Defendants' "proof" was in the form of opinion testimony in two affidavits of school officials they did not call to the witness stand, opinions constructed on hypotheses the trial court found to be contrary to the record in the case and contrary to the unappealed 1972 findings of the trial court. Petitioners inaccurately characterize those affidavits as "uncontroverted." Respondents controverted the affidavits frontally, pointing to their several defects. The trial court found they depended "upon a belated neutral justification for heretofore unexplained discriminatory events," and upon "a tendency to erase from the hypothetical not only the discriminatory act but other historical events as well, and a failure to account for the repercussions of such changes" (A-44). The trial court rejected such "evidence." Without it, there was no basis for the motion to dismiss.

When stay applications were denied, defendants complied or attempted to comply with the trial court's order. Doing so required modest effort: two elementary schools were closed one year ahead of plan; 1,400 more students are being transported than defendants had planned; three junior high schools were reorganized sooner than planned;

[2]Defendants requested an increase of eight percent; the trial court granted four percent. Defendants also asked for special, further dispensation for one school with a subsential Indian population; the trial court denied that request.

approximately 150 students were transferred because of controlled enrollment (see, Affidavit of Superintendent Raymond Arveson, June 15, 1978, pp. 11-13). There has been no significant disruption reported on account of these efforts.

## Argument

### A. THERE IS NO ADEQUATE FACTUAL BASIS FOR PETITIONERS' POSITION.

As indicated above, the trial court rejected defendants' motion to dismiss on both factual and legal grounds. The trial court doubted that this Court intended in *Dayton* to change the law that systemwide discrimination calls for a systemwide remedy. See Part B, *infra*. Nevertheless, the trial court examined petitioners' position carefully, to determine whether they had presented proof adequate to support dismissal if their view of *Dayton* should prove correct. Petitioners attempted to use an "alternate universe theory" (A-42), suggesting hypothetical enrollments by race for certain schools. After describing petitioners' methodology, the trial court observed:

> The Court doubts that the Supreme Court intended *Dayton* to be quantified in precisely this manner. But even assuming the validity of defendants' view, their attempted application of it is fraught with difficulties. The hypothetical figures representing what would have happened are based on numerous retrospective assumptions of *questionable soundness.* (A-43-44) (emphasis supplied)

Defendants offered two principal items of "proof" in their effort to demonstrate elimination of incremental segregative effect, affidavits of two District employees. The trial court rejected that proof, indicating that the affidavits were insufficient for several reasons, including:



1. In several instances they presume that the found acts of discrimination were not discriminatory (A-44);
2. Petitioners ignore obvious facts, such as the need to close schools and transport pupils in a time of declining enrollment (see A-44) and the fact that the District had prior to 1972 embarked upon a program of school pairings and clusters; and
3. Petitioners failed to account for the repercussions of such facts known in 1972 as the need for school closings (A-44), and the availability of new transportation aid.

These deficiencies led the trial court to find that petitioners' hypotheticals as to schools purposefully maintained as identifiably black schools were "unreliable" (A-45), and to reject petitioners' evidence.

Petitioners complain that the trial court "rendered it impossible to prove the presence of, or the elimination of, incremental segregative effect . . ." (Petition, p. 13). Petitioners misread the trial court's decision. We agree that it is difficult in a systemwide case to prove elimination of incremental segregative effect; the attempt may even be futile in a case involving pervasive, systemwide segregation. However, it is unnecessary and inappropriate on the record in this case to reach that issue. What the trial court held in this case was not that proof would necessarily be impossible, but that petitioners wholly failed to prove the

elimination of incremental segregative effect. The court of appeals affirmed that holding. Neither court, of course, was obliged to accept as accurate the affidavit opinion testimony of defendants' employees. *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U.S. 290, 292 (1934); *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 627 (1944); and *Solomon* v. *Renstrom*, 150 F. 2d 805, 808 (8th Cir. 1945).

It is not the responsibility of either the trial court or the court of appeals to supply the defendants' deficiencies of proof.[3] Two factitious affidavits grounded upon artificial, biased, inaccurate, incomplete hypotheticals are not sufficient basis for dissolving an injunction. Neither are they an adequate record for review in this Court of any issue purporting to be of Constitutional import.

### B. *DAYTON* DID NOT REQUIRE COURT TO IGNORE SYSTEMWIDE IMPACT OF SYSTEMWIDE DISCRIMINATION.

This Court has made it clear that "if there has been a systemwide impact" of discrimination, then "may there be a systemwide remedy." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 213

[3]One method for proving elimination of the incremental effects of past discrimination would be to prove compliance with the orders of the trial court. We have urged dismissal of this litigation for years, conditioned only upon defendants coming into compliance and remaining there long enough to assure that compliance is not "ephemeral" (A-51). We have suggested that, upon compliance, the case be placed on the inactive calendar with a view to seeing it dismissed within two to three years in the absence of a new need for court review. *Cf. United States* v. *Texas (San Felipe del Rio)*, 509 F.2d 192 (5th Cir. 1975). All this is not to say there is no other way to prove elimination of incremental effects of past discrimination, such as through expert testimony of students of the effects of discriminatory conduct, but only to say defendants have not offered adequate proof.



(1973). To avoid having two systems of law, one for the South and one for the North, it is necessary to acknowledge that a systemwide remedy may be appropriate in a northern school system. When systemwide discrimination is proved, as in Minneapolis, it is both appropriate and necessary to fashion a systemwide remedy to eliminate all effects of that discrimination. The trial court was well aware of the need for the extent of the remedy to fit the extent of the wrong, stating:

> The remedies imposed in this case have been formulated with the understanding that remedies must be tailored to the wrong and have been proper in all respects. (A-46)

The trial court has also been extremely sensitive (perhaps overly-sensitive, as respondents perceive it) to the need to leave educational policy decisions in the hands of defendants. This sensitivity has been demonstrated from the onset of this litigation (see A-34), in giving the District three years to implement an integration plan, and at each successive stage of this litigation.

It would be particularly inappropriate to require reexamination of the remedy the trial court formulated in this case, inasmuch as the decree was entered six years ago and never appealed. Petitioners may not challenge the validity of the judgment as entered. *Cf. Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. 424, 432 (1976); see *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). Petitioners have admitted noncompliance (prior to this fall) with an unappealed injunction; they have failed to show any change in facts to justify vacating the decree; the law they point to as requiring the decree to be vacated, the

*Dayton* decision, expressly affirms the power of a district court to enter a decree of the type here involved. Petitioners have failed to satisfy any of the requirements of Rule 60(b)(5), Federal Rules of Civil Procedure, for vacating a judgment. To require reexamination at this late date of the 1972 injunction on the record in this case would be to invite reexamination of the final decree in virtually every school integration case in this nation.

### C. PETITIONERS' ALTERNATIVE MOTION FAILS, ALSO, TO RAISE ISSUES THIS COURT SHOULD ADDRESS.

Petitioners moved, in the alternative, for modification of the injunction. As noted, the Court granted that motion in part, raising guidelines for enrollment of black and Indian students by four percent. Petitioners had requested an increase of eight percent, plus a special increase that would have affected one school with a large enrollment of Indian students. The difference between four and eight percent hardly rises to the level of Supreme Court significance. The trial court acted well within its discretion. As to the proposed variance for Indian students, the trial court acted on both factual and legal grounds. The court made a factual determination that the needs of Indian students "have been and can be met by means other than promoting segregation" (A-56). The close interrelationships among the school most affected by petitioners' proposal and those near it also justified denial of the motion (A-57). Legally, the trial court was persuaded that a compelling need for segregating Indian students would be required to justify any such action (A-57). However, it was not necessary to reach that issue as the District showed no real need for segregation at all (A-56-57).



### Conclusion

For the reasons set forth above, the petition should be denied.

Dated: December 13, 1978.

Respectfully submitted,

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